No. 89-5383-CSX
Status: GRANTED

Docketed:
August 15, 1989

Title: Mark Howlett, a minor, by and through Elizabeth Howlett, his mother, natural guardian and next friend, Petitioner
v.
Scott Rose, as Superintendent of Schools for Pinellas County, Florida, et al.

Court: District Court of Appeal of Florida, Second District

Counsel for petitioner: Beckett Jr.,Gardner W., Shapiro,Steven R.

Counsel for respondent: Collins-Johnson,Christa L., Taylor,Bruce P.

Entry	Date	Note	Proceedings and Orders
1	Aug 15 1989	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Sep 12 1989		Order extending time to file response to petition until October 16, 1989.
5	Oct 12 1989		Brief of respondents Scott Rose, et al. in opposition filed
6	Oct 19 1989		DISTRIBUTED. November 3, 1989
8	Nov 6 1989		REDISTRIBUTED. November 9, 1989
10	Nov 13 1989		Petition GRANTED.
			**********
12	Nov 24 1989		Order extending time to file brief of petitioner on the merits until January 8, 1990.
13	Nov 30 1989		Record filed.
		*	Circuit Court, Pinellas Co., 1 vol.
14	Jan 2 1990		Joint appendix filed.
15	Jan 8 1990		Brief of petitioner Mark Howlett filed.
16	Jan 26 1990		SET FOR ARGUMENT TUESDAY, MARCH 20, 1990. (1ST CASE)
18	Jan 26 1990		Order extending time to file brief of respondent on the merits until February 8, 1990.
20	Feb 8 1990		Brief amici curiae of Washington Legal Foundation, et al. filed.
21	Feb 8 1990		Brief amici curiae of Natl. Assn. of Counties, et al. filed
22	Feb 8 1990		Brief of respondent Scott Rose, et al. filed.
19	Feb 9 1990		Record filed.
		*	Lodging reced-Pinellas Co. Schools
23	Feb 15 1990		CIRCULATED.
24	Mar 5 1990	X	Reply brief of petitioner Mark Howlett filed.
25	Mar 20 1990		ARGUED.

89-5383

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and friend,

Petitioner,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,

Respondents.

Case No. _____

Supreme Court, U.S.
FILED
AUG 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

Petition for Writ of Certiorari

to the

District Court of Appeal of Florida

Second District

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QUESTION PRESENTED FOR REVIEW

WHETHER A FLORIDA LOCAL SCHOOL BOARD AND ITS LOCAL SCHOOL OFFICIALS ARE, BY VIRTUE OF THE SOVEREIGN IMMUNITY OF THE STATE, IMMUNE FROM SUIT IN AN ACTION BROUGHT AGAINST THEM IN A FLORIDA COURT PURSUANT TO THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983.

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IN THE SUPREME COURT OF THE UNITED STATES

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and friend, Petitioner, v. SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, Respondents.	Case No. _____

PETITION FOR WRIT OF CERTIORARI
TO THE
FLORIDA DISTRICT COURT OF APPEAL
SECOND DISTRICT

Petitioner, MARK HOWLETT, respectfully urges that a writ of certiorari issue to review the judgment and opinion of the Florida District Court of Appeal, Second District, rendered February 1, 1989.

Opinion Below

The judgment sought to be reviewed is final and dated February 1, 1989. A copy is appended as Appendix 1 and also appears at 537 So.2d 706. No petition for rehearing was filed.

The Supreme Court of Florida denied discretionary review on May 17, 1989. A copy of its order is appended as Appendix 4. No petition for rehearing was permitted.

Jurisdiction

Jurisdiction of this court to review by certiorari is conferred by 28 U.S.C. Section 1257.

• Statute Involved

The federal Civil Rights Act of 1871, 42 U.S.C. Section 1983 reads in full:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case

Mark Howlett, a minor, by and through his mother, Elizabeth Howlett, as his mother, natural guardian and next friend, brought an action under the Civil Rights Act of 1871, 42 U.S.C. Section 1983 (hereafter Section 1983) against the School Board of Pinellas County, Florida, and named school officials employed by the Board. The action was brought in the Circuit Court of Pinellas County, Florida, the state court of general jurisdiction having jurisdiction over the parties and subject matter.

The Florida circuit court, on defendants' motion, dismissed the action with prejudice on the theory that the action was barred in a Florida court by the sovereign immunity of the State of Florida.[1]

On appeal to the Florida District Court of Appeal, Second District, Howlett presented the following questions for decision:

> "I
>
> "WHETHER THE QUESTION OF A STATE AND ITS SUBDIVISIONS' SOVEREIGN IMMUNITY TO AN ACTION BROUGHT IN A STATE COURT UNDER THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983, IS A QUESTION OF STATE OR FEDERAL LAW?

1. As an alternate ground for dismissal, the circuit court held that the action was also barred as premature because of the failure of Elizabeth Howlett on behalf of her son to exhaust administrative remedies. This alternative ground was not reached by the Florida appellate court. It affirmed the circuit court's dismissal solely on the basis of sovereign immunity (A2).

> "II
>
> WHETHER UNDER FEDERAL LAW A FLORIDA SCHOOL BOARD IS IMMUNE FROM SUIT UNDER SECTION 1983?" (A2)[2]

Relying upon a decision of the Supreme Court of Florida, **Hill v. Department of Corrections, State of Florida**, 513 So. 2d 129 (Fla. 1987), cert. den. ___ U.S. ___, 98 L.Ed2d 989, 108 S. Ct. 1024 (1988), the Florida District Court of Appeal, Second District, affirmed the dismissal, stating that:

> "... to the extent that the actions of the state [of Florida] and its agencies are protected by sovereign immunity, an action pursuant to section 1983 will not lie in state courts. The question of whether that sovereign immunity exists is a question of state law and not federal law." (A2, emphasis added).

Restating its holding, the court continued:

> "In both the trial court and on appeal, appellant argued that the question of whether a state has maintained its common law sovereign immunity from a section 1983 suit in its state courts is a question of federal law. It is not." (A2, emphasis added).

The court then concluded by

> "the question of whether a state has waived its own common law immunity in its courts is a question of state law. Appellant's primary argument thus fails and the trial court judgment must be affirmed." (A3, emphasis added).

Reasons Why the Writ of Certiorari Should Be Issued

The conclusion of the court below begs the question. It is literally true that "whether a state has waived its own common law immunity in its own courts is a question of state law." (A2). This is necessarily so. Only a state can waive its own immunity. By definition, a waiver is "[t]he intentional

2. A third question presented was

> "III
>
> "WHETHER IT IS NECESSARY TO EXHAUST STATE REMEDIES UNDER THE FLORIDA ADMINISTRATIVE PROCEDURE ACT BEFORE BRINGING AN ACTION FOR DAMAGES IN A FLORIDA COURT UNDER SECTION 1983?"

As stated in footnote 1 above, the Florida appellate court expressly did not reach this third question since it affirmed the circuit court's dismissal solely on the basis of sovereign immunity (A3).

relinquishment of a known right." **Black's Law Dictionary**, Third Edition, 1944 (West Publishing Co., St. Paul, Minn.). A waiver, however, presupposes the existence of a right to be waived. If there is no underlying right, it is immaterial to argue that it has not been waived. If under federal law a state school board has no immunity from an action under Section 1983 in state courts, it is immaterial to argue that the state has not waived whatever immunity it might have had. Such an argument fails if the school board's immunity has been waived for it, and without its consent, by operation of federal law. It was error, therefore, for the court below to decide that the School Board enjoyed im- munity from suit under Section 1983 merely because the state has not waived its immunity under Florida law. That is the beginning rather than the end of the question.

Under the Supremacy Clause, the "Laws of the United States" are the "supreme Law of the Land" and "the Judges of every State [are] bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (Constitution, Article VI, Section 2). Section 1983 is a law of the United States. In **Martinez v. California**, 444 U.S. 277 (1980), suit was brought in a California court under Section 1983 against a state official who raised the defense of immunity conferred upon him by a statute of California. This court said:

> "It is clear that the California immunity statute does not control this claim [under Section 1983] even though the federal cause of action is being asserted in the state courts." **Ibid.** 284.

In a footnote this court explained:

> "Conduct by persons acting under color of state law which is wrongful under 42 USC s. 1983 or s. 1985(3) [42 USCS s. 1983 or s. 1985(3)], **cannot be immunized by state law.** A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See McLaughlin v. Tilendis, 398 F2d 287, 290 (7th Cir 1968). **The immunity claim raises a question of federal law.** Hampton v. Chicago, 484 F2d 602, 607 (CA7 1973), cert denied, 415 US 917, 39 L Ed 2d 471, 94 S Ct 1413, 94 S Ct 1414." **Ibid.**, emphasis added).

The court below attempted to distinguish **Martinez**. It said that the California statute in that case "sought to immunize state officials from [liability for] injuries resulting from particular conduct" and did not attempt to close the courts of California generally to all actions under Section 1983. From this the court below reached the conclusion that "**Martinez** does not pertain to the question of state common law immunity...." (A3). The Florida court read **Martinez** to mean that even though a state could not immunize particular conduct under Section 1983, nevertheless it was free to immunize itself and its subdivisions generally by prohibiting "the use of its courts for suits against the state in those state courts." (A3). In other words, the court below read **Martinez** to mean that a state could immunize itself and its subdivisions completely, but not partially, from an action under Section 1983 in its own courts.

Against that strained construction of **Martinez** is this court's own construction of **Martinez** in **Felder v. Casey**, ___ U.S. ___, 101 L.Ed2d 123 (1988):

> "States, however, may no more **condition** the federal right to recover [under Section 1983] for violations of civil rights **than bar that right altogether**, particularly where those conditions grew out of a waiver of **immunity** which, however necessary to the assertion of state-created rights against local governments, is **entirely irrelevant** insofar as the assertion of the federal right is concerned, see Martinez, 444 U.S. at 284." **Ibid.**, at 141-2 (emphasis added).

Martinez and **Felder**, read together, made it clear that under federal law the liability of state subdivisions and their employees to Section 1983 actions in state courts is "essentially" a question of "pre-emption", **Felder**, **supra**. at 138. Preemption operates as a matter of federal law under the Supremacy Clause. **Felder**, **ibid**. It does not depend upon whether, as in **Martinez**, the state sought to create a new immunity for particular officials, or whether, as in **Felder**, the state sought to condition a waiver of immunity upon conditions not found in Section 1983. In either case federal law controls. Only those "certain immunities for state officials" which federal law itself recognizes, **Felder**,

supra. at 139, apply when a Section 1983 action is brought in a state court, just as they apply when it is brought in a federal court.

The conclusion follows that the question of state immunity to an action brought under Section 1983 in a state court is a question of federal and not state law. Certiorari should be granted to correct the error of the Florida court below in arriving at the opposite conclusion.

II

Under controlling federal law a Florida school board is not immune from suit under Section 1983. **Mt. Heathly City School Board of Education v. Doyle**, 429 U.S. 274 (1977). **Mt Healthy** was brought in a federal court and this court raised the question sua sponte whether the Ohio city school board partook of the sovereign immunity of the state protected by the Eleventh Amendment. Finding that under Ohio law the city school board had its own treasury and its own taxing authority, the court concluded that an Ohio city school board

> "is more like a county or city than it is like an arm of the State [and is] not entitled to assert any Eleventh Amendment immunity from suit in the federal courts." **Ibid.**, at 281.

A reference to Florida law shows that a Florida school district, like an Ohio city school district, has "extensive power to issue bonds," **ibid.**, 280 (See Section 236.37, Fla.Stat. (1987)) and power "to levy taxes," **ibid.**, (See Section 236.35, Fla.Stat. 1987)). Accordingly, it is "not entitled to assert any Eleventh Amendment immunity from suit in the federal courts." Ibid.

The same result follows where a Florida school board is sued under Section 1983 in a state court, as here. The federal cause of action under Section 1983 "cannot be immunized by state law." **Martinez, supra**, 284, n. 8. Its only chance of immunity is under federal law. Not being immune under federal law, **Mt.**

Healthy, supra, a Florida school board has no immunity, whether sued in a federal or a state court. **Martinez, supra.**

The conclusion follows that the School Board in this case is not immune from suit under Section 1983 in a Florida court. Certiorari should be granted to enforce this result.

III

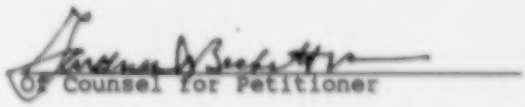
This petition does not present the question whether the State of Florida itself is immune from suit under Section 1983. That question is pretermitted by the fact that a state is not a "person" as that word is used in Section 1983. **Will v. Michigan Department of Police**, ___ U. S. ___, 105 L.Ed2d 45 (1989).

IV

The error of the Florida court below is widespread and should be corrected. See **Moss v. Robertson**, 712 S.W.2d 351 (Ky. Ct.App. 1986)(dismissing Section 1983 action against county clerk sued individually;; **McMahon v. Lopez**, 199 Cal.App.3d 829, 245 Cal. Rptr. 172 (1988) (Section 1983 not available against counties); **Jeffers v. Ray County**, 750 S.W.2d 599 (Mo.Ct.App. 1988) (counties); **Evans v. Clayton County**, 182 Ga.App. 613, 356 S.E.2d 553 (1987)(counties); **Carbone v. Overfield**, Case No. 44291 Cuyahoga County Ct.App. Ohio, July 1, 1982) (Section 1983 does not abrogate Ohio doctrine of sovereign immunity), rev'd on other grounds, 6 Ohio St.3d 212, 451 N.E.2d 1129 (1983) (no sovereign immunity defense in negligence action against board of education); **Cepeda v. Coughlin**, 513 N.Y.S.2d 528 (App.Div.) (statutory restriction of jurisdiction of claims against certain state employees), leave to appeal denied, 70 N.Y.2d 602, 512 N.E.2d 550, 518 N.Y.S.2d 1024 (1987).

Conclusion

Certiorari should be granted and the judgment under review should be reversed with instructions to reinstate the complaint for further proceedings.



Of Counsel for Petitioner

Supreme Court, U.S.
FILED
OCT 12 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-5383

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

MARK HOWLETT, a minor by and through ELIZABETH HOWLETT, his mother, natural guardian and friend, Petitioners,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT, and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

WHETHER THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983 ABROGATES STATE SOVEREIGN IMMUNITY IN SUITS BROUGHT AGAINST A STATE OR ONE OF ITS AGENCIES IN ITS OWN STATE COURTS.

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Gumbhir v. Kansas State Board of Pharmacy, 231 Kan. 507, 646 P.2d 1078 ( )

Hill v. Dept. of Corrections, 513 So.2d 129 (Fla. 1989) cert. denied __ U.S.__, 108 S.Ct 1024, 98 L.Ed.2d 989 (1988)

Howlett by Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989)

Jeffers v. Ray County, 750 S.W.2d 599 (Mo.App.1988)

Martinez v. State of California, 444 U.S 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980)

Moss v. Robertson, 712 S.W.2d 351 (Ky.App.1986)

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Quern v. Jordan, 440 U.S 332, 99 S.Ct. 1347, 39 L.Ed.2d 662 (1984)

Ramah Navajo School Board v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (N.M.App) cert denied, __ U.S.__, 107 S.Ct. 423, 93 L.Ed.2d 373 (1986)

42 U.S.C. §1983

Rule 17.1(c), Supreme Court Rules

§768.28, Fla. Stat.

MARK HOWLETT, a minor by and through ELIZABETH HOWLETT, his mother, natural guardian and friend, Petitioners,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT, and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, Respondents.

The respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the District Court of Appeal for Florida, Second District, opinion in this case. That opinion is reported at 537 So.2d 706 (1989).

REASONS WHY THE PETITION SHOULD BE DENIED

I. **The district court decision does not conflict with prior decision of this Court.**

Petitioner has failed to show that the District Court of Appeal for the Second District of Florida, (hereinafter Second DCA), decision in Howlett by Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989), is in conflict with applicable decisions of this Court so as to give rise to this Court's jurisdiction pursuant to Rule 17 of the Supreme Court Rules. Rule 17.1(c) states:

> (c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioner relies on two of this Court's decisions to support the request for discretionary review.

Petitioner claims that the opinion rendered by the DCA in Howlett by Howlett v. Rose, 537 So.2d 706 (Fla. 2nd DCA 1989), is in conflict with the decision rendered in Felder v. Casey, 487 U.S. __, 108 S.Ct. __, 101 L.Ed.2d 123 (1988), and Martinez v. State of California, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980). Such reliance is misplaced. Careful reading of these two cases in accordance with the decision in Howlett reveals no such conflict.

Martinez, supra, involved a claim against the State of California for damages arising after the murder of a 15-year old girl by a parolee, a known repeat sex offender. The action was brought under state statutes and 42 U.S.C. §1983 in the state court system. The state claimed immunity pursuant to a state statute which provided absolute immunity to state officials and employees for injuries which resulted from a decision to release or parole a prisoner. This Court did not, however, address the immunity question but rather ruled that no right guaranteed by the United States Constitution or a law of the United States was violated, dispensing with the need to reach the immunity issue. This Court stated:

> It is clear that the California immunity statute does not control this claim even though the federal cause of action is being asserted in the state courts. We also conclude that it is not necessary for us to decide any question concerning the immunity of state parole officials as a matter of federal law because, as we recently held in Baker v. McCollan, 443 U.S 137, 99 S.Ct. 2689, 61 L.Ed.2d 433, "[t]he first inquiry in any §1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the

> Constitution and laws' of the United States. The answer to that inquiry disposes of this case.

Martinez, supra, at 284 (footnote omitted).

Petitioner further indicates that Martinez, supra, (which does not conflict with Howlett) should be read in connection, and together, with Felder v. Casey, 487 U.S. __, 108 S.Ct.__, 101 L.Ed.2d 123 (1988). Felder, supra, involved a 42 U.S.C. §1983 claim against the City of Milwaukee, Wisconsin and several police officers after an injury allegedly inflicted on a black individual by white police officers. This case involved a Wisconsin notice of claim statute in regards to §1983 claims. This Court, while thoroughly addressing the notice provisions and the intent of Congress in enacting §1983 legislation, did not squarely address the issue of sovereign immunity. Thus, no conflict arises which would invoke jurisdiction over the Howlett decision in the Florida courts.

In Howlett, supra, the DCA relied on Hill v. Dept. of Corrections, 513 So.2d 129 (Fla. 1987), a well reasoned opinion by the Florida Supreme Court. Hill addressed the applicability of the Eleventh Amendment immunity, state common law immunity, and §768.28, Fla. Stat. (1988) in causes of action brought under 42 U.S.C. §1983.

The Florida Supreme Court first considered the effect of the Eleventh Amendment on suits filed under 42 U.S.C. §1983. The court relied on Quern v. Jordan, 440 U.S 332, 99 S.Ct. 1347, 39 L.Ed.2d 662 (1984), for the proposition that §1983 is not a

"congressional abrogation of a state's eleventh amendment immunity." Hill, supra, at 131. The eleventh amendment applies to actions brought in federal courts. This Court in Quern, supra stated that Congress did not intend §1983 to override traditional sovereign immunity.

The court in Hill analyzed the distinction between Eleventh Amendment immunity and sovereign immunity and stated:

> In Ramah Navajo School Board v. Bureau of Revenue, 104 N.M. 302, 720 P.2d 1243 (N.M.App.) cert. denied, __ U.S. __, 107 S.Ct. 423, 93 L.Ed.2d 373 (1986), the court addressed the question by first explaining:
>
> "Sovereign immunity and Eleventh Amendment immunity are, of course, distinct concepts, but both immunities are designed to protect the same object - state government. Civil Action Against State Government: Its Divisions, Agencies and Officers (Winborne, ed. 1982). The Eleventh Amendment shields the operation of state governments from intrusions from the federal judiciary while sovereign immunity protects state governments from intrusions from the federal judiciary while sovereign immunity protects state government affairs from interference by plaintiffs and state courts. Id. Therefore, when a Section 1983 suit is brought in federal court, the court analyzes whether the defendant is a "person" within the meaning of Section 1983 or, more meaningfully expressed, whether the Eleventh Amendment bars the suit from being brought against that defendant. Similarly, in Section 1983 actions brought in state courts, the court determines whether sovereign immunity bars the suit. Gumbhir v. Kansas State Board of Pharmacy [231 Kan. 507, 646 P.2d 1078]."
>
> 104 N.M. at 307, 720 P.2d at 1248. The court then reasoned that since Congress in enacting section 1983 did not intend to destroy the state's eleventh amendment immunity from suit brought in federal court, it logically followed that Congress also did not intend to abrogate the state's sovereign immunity from section 1983 suits brought in state courts.

Hill, supra, at 131.

The Court did indicate that just as in a case which involves eleventh amendment immunity, the courts must determine if there has been a waiver of sovereign immunity. The question of waiver is not an issue raised by petitioner.

II. Eleventh Amendment Immunity

Petitioner makes reference to the immunity issue as it relates to the School Board of Pinellas County and cites Mt. Healthy City School Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Mt. Healthy applies only to eleventh amendment immunity issues and addresses the question of whether the school district is an arm of the state by analyzing the powers and duties of the school district. Petitioner attempts to utilize this same rationale to determine the applicability to the instant case. In Howlett, however, eleventh amendment immunity has not been addressed and does not apply. Petitioner's analysis of Mt. Healthy here is inappropriate.

III. Conflicting state court decisions distinguishable.

Petitioner cites a number of state court decisions to support the proposition that state courts have contradicted existing U.S. Supreme Court decisions. These cases are distinguishable from the instant case. Moss v. Robertson, 712

S.W.2d 351 (Ky.App.1986) involved a §1983 suit against an individual in his individual capacity. The Kentuckey court did not address the sovereign immunity issue and dismissed the suit against the individual for lack of governmental action. Moss, supra, does not contradict either Martinez, supra, or Felder, supra.

Further, petitioner cites Jeffers v. Ray County, 750 S.W.2d 599 (Mo.App. 1988), which also was a §1983 claim. That court did not address an immunity situation, but whether or not the factual allegations were sufficient to support a §1983 claim. The court stated that a plaintiff cannot take a common negligence action and turn it into a §1983 claim. No conflict with Martinez, supra, or Felder, supra, exists. The remaining cases also cited do not involve sovereign immunity as does Howlett and do not constitute conflicts with the existing decisions of this Court, and thus, cannot give rise to jurisdiction of this Court pursuant to Rule 17 of the Supreme Court Rules.

Conclusion

Petitioner has failed to show sufficient conflict with existing decisions of this Court to invoke jurisdiction for review pursuant to the provisions of Rule 17 of the Supreme Court Rules. Howlett, supra, the instant case is not in conflict with the decisions cited by petitioner. Howlett, supra, relied on Hill v. Department of Corrections, 513 So.2d 129 (Fla. 1987),

cert. denied, __ U.S. __, 108 S.Ct. 1024, 98 L.Ed.2d 989 (1988). Neither of these Florida court decisions is in conflict with Martinez, supra, or Felder, supra.

Eleventh Amendment immunity is not applicable here and thus discussion of Mt. Healthy is not appropriate to this petition. Further, cases cited by petitioner alleging widespread incorrect decisions regarding sovereign immunity are completely distinguishable so do not conflict with existing decisions of this Court, and do not give rise to jurisdiction under Rule 17.

For the foregoing reasons, respondents respectfully request that the Court deny Petitioner's request for a writ of certiorari.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been forwarded to Gardner W. Beckett, Jr., Esq., Nelson, Beckett & Nelson, 123 Eighth Street North, St. Petersburg, FL 33701 this the 12 day of October, 1989.

Bruce P. Taylor

BRUCE P. TAYLOR
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clm

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AUG 25 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 89-5383

Mark Howlett, etc. (Petitioner ~~or Appellant~~) vs. Scott Rose, etc., et al. (Respondent ~~or Appellee~~)

The Clerk will enter my appearance as Counsel of Record for Mark Howlett

(Please list names of all parties represented)

who IN THIS COURT is ☒ Petitioner(s) ☐ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature [signature]

(Type or print) Name Gardner W. Beckett Jr.

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

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ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A

[redacted]

[redacted]

[redacted]

Petitioner,

v.

[redacted]

Respondents.

[redacted]

JOINT APPENDIX

[redacted]

Bruce P. Taylor*
P.O. Box 4668
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Telephone (813) 462-9677
Counsel for Respondents

[redacted]

PETITION FOR CERTIORARI FILED AUGUST 15, 1989
CERTIORARI GRANTED NOVEMBER 13, 1989

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IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL NO. 86-19231-9

MARK HOWLETT, a minor, by and through Elizabeth Howlett, his mother, natural guardian and next friend,
Plaintiffs,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida, WILLIAM GREY, THOMAS PETIT and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,
Defendants.

COMPLAINT

NOW COMES MARK HOWLETT, a minor, by and through Elizabeth Howlett, his mother, natural guardian and next friend, and complains against Defendants, Jointly and severally, and states as follows:

COUNT I

PARTIES

1. Plaintiff, MARK HOWLETT, a minor, and both ELIZABETH HOWLETT and MARK HOWLETT are citizens of the United States, and residents of the City of St. Petersburg, Pinellas County, Florida.

2. At all times material, Plaintiff MARK HOWLETT was and is enrolled as a student of St. Petersburg Senior High School in St. Petersburg, Pinellas County, Florida. St. Petersburg High School is a public educational institutional operated by the Defendant SCHOOL BOARD OF

PINELLAS COUNTY, FLORIDA, a public body under Florida law.

3. At all times material, Defendant SCOTT ROSE was and is the superintendent of schools for Pinellas County, Florida, and serves at the pleasure and direction of Defendant SCHOOL BOARD.

4. At all times material, Defendant WILLIAM GREY was and is the principal of St. Petersburg Senior High School, and as such, is employed by, and serves at the direction of Defendants SCHOOL BOARD and ROSE.

5. At all times material, Defendant THOMAS PETIT was and is employed as the assistant principal of St. Petersburg High School, and as such, serves under the direction of Defendant SCHOOL BOARD, and Defendants ROSE AND GREY.

FACTS

6. This is an action for damages which exceed $5,000.00, exclusive of costs, interest and attorney fees, and for injunctive relief, for violations of the constitution of the United States, particularly the Fourth and Fourteenth Amendments thereto; the provisions of Title 42 United States Code, Section 1983; the Constitution of the State of Florida, particularly Article I, Section 12, and Rules promulgated by the Defendant SCHOOL BOARD, under the authority granted to said Defendant by Section 230.23 (6)(c) and (d), Florida Statues.

7. Each and all of the acts of Defendants alleged herein were done by Defendants, and each of them, under color of the statutes, ordinances, regulations, customs, and usages of the State of Florida, and the School District of Pinellas County, Florida, and under the authority of

their offices as school officials of said State and School Board.

8. On or about the morning of October 9, 1986, Plaintiff MARK HOWLETT was duly enrolled in and attending classes at St. Petersburg Senior High School, and was in good academic standing at said school.

9. Plaintiff MARK HOWLETT was summoned to a parking area outside the structure of St. Petersburg High School, and was directed to the location at which he had parked and locked his vehicle, a 1966 Volkswagen, upon his arrival at school that morning. The vehicle was properly and legally parked.

10. Defendant SCHOOL BOARD has delegated authority to school principals under its jurisdiction to effect and administer searches of students and their property. Defendant GREY in turn delegated authority to effect searches of students and their property at St. Petersburg High School to Defendant PETIT, without instructing Defendant PETIT as to the proper execution of said searches.

11. Upon arrival at his parked vehicle, Plaintiff HOWLETT learned that Defendant PETIT had illegally entered Plaintiff's locked vehicle by pushing in a side vent window, for the purpose of procuring information regarding ownership of said vehicle.

12. Defendant PETIT had learned, after his wrongful entry into Plaintiff's vehicle, that the vehicle belonged to Plaintiff. Defendant PETIT nevertheless continued to search Plaintiff's vehicle, even though his stated purpose for entering the vehicle—to determine ownership—had been fulfilled.

13. A valid Florida license tag had been, and was at all times relevant to this action prominently displaced on the

exterior of said vehicle, plainly visible to the naked eye from outside the vehicle.

14. Plaintiff MARK HOWLETT was confronted by Defendant PETIT with property which Defendant PETIT had seized from the interior of Plaintiff MARK HOWLETT's vehicle.

15. Said property was seized by Defendant PETIT from the locked interior of Plaintiff MARK HOWLETT's vehicle, said seizure by Defendant PETIT being effected in the absence of any reasonable suspicion whatsoever that entry into said vehicle would yield contraband, evidence of a crime or violation of school regulations, or any other justification whatsoever. The action by Defendant PETIT of entry into and seizure of property from Plaintiff's vehicle was undertaken under the authority conferred upon Defendant PETIT by Defendant GREY, Defendant ROSE, and Defendant SCHOOL BOARD.

16. The property seized consisted of three (3) empty wine cooler bottles, and a fourth bottle containing a small quantity of an eggnog-like substance, allegedly containing alcohol.

17. Plaintiff MARK HOWLETT was informed by Defendant PETIT that entry had been made into Plainiff's vehicle in order to locate evidence of ownership, so that the vehicle could be moved from its present location, which, according to PETIT was obstructing the movement of construction vehicles in the immediate area in which Plaintiff's vehicle had been parked.

18. At no time did Defendant PETIT, or any other Defendant, or agent of Defendant, make any effort to discern ownership of Plaintiff's vehicle, via a computer check of the license tag, a utilization of the high school's

public address system, or any other non-intrusive means of locating Plaintiff.

19. At no time did Defendant PETIT, or any other Defendant or agent thereof contact any towing company to effect removal of Plaintiff's locked vehicle from its location, without the necessity of physical entry into Plaintiff's vehicle.

20. At no time did Defendant PETIT, or any other Defendant or agent thereof, make any effort whatsoever to manually effect movement of said locked vehicle so as to permit the passage of vehicular traffic in the area near Plaintiff's vehicle.

21. As a result of the illegal seizure of property from Plaintiff's vehicle, Plaintiff MARK HOWLETT was suspended from attending classes at St. Petersburg Senior High School for a period of five (5) days for alleged violation of regulations pertaining to possession by students of alcoholic beverages, thereby seriously jeopardizing his timely completion of his matriculation and admission to and attendance at a college or university.

22. The conduct of Defendants, and each them, deprived Plaintiff MARK HOWLETT of the rights, privileges and immunities secured to him by the Fourth and Fourteenth Amendments to the Constitution of the United States, Article I, Section 12 of the Constitution of the State of Florida, and the Code of Student Conduct enacted by Defendant SCHOOL BOARD, pursuant to the authority granted by Section 230.23(6)(c) and (d), Florida Statutes, to wit: the right of Plaintiff to be secure in his person and effects against unreasonable searches and seizures.

23. As a result of the aforementioned violation of Plaintiff MARK HOWLETT's rights by the Defendants,

Plaintiff HOWLETT has suffered humiliation, embarrassment, damage to his good name, and emotional distress.

24. The acts, conduct and behavior of Defendants, and each of them, were performed knowlingly and intentionally, and with reckless disregard and indifference to MARK HOWLETT's federal constitutional rights and his rights under Florida constitutional law, and other Florida law and regulations, by reason of which Plaintiff is entitled to an award of punitive damages in excess of $5,000.00.

25. Plaintiff has suffered irreparable harm and has no adequate remedy at law. Defendants will continue to engage in improper, unwarranted and illegal searches of student vehicles unless enjoined from doing so in the future.

WHEREFORE, Plaintiff demands judgment as follows:

A. Awarding Plaintiff compensatory damages in an amount in excess of $5,000.00.

B. Awarding Plaintiff punitive damages in an amount in excess of $5,000.00.

C. Entry of a permanent injunction enjoining the Defendants, and each of them, from any entry into, or search of students' motor vehicles.

D. A mandatory injunction ordering the Defendants, and each of them, to rescind the suspension previously imposed upon the Plaintiff MARK HOWLETT, expunging any reference to the incident in question from Plaintiff MARK HOWLETT's school record, and giving Plaintiff MARK HOWLETT a reasonable opportunity to make up all schoolwork missed as a result of the suspension upon him.

E. Award to Plaintiff attorney fees, pursuant to the provisions of Title 42 United States Code Section 1988, as well as costs and expenses of this action.

F. Any other relief deemed appropriate, equitable or just by this Honorable Court.

COUNT II

26. The Plaintiffs re-assert and re-allege each and every allegation of this Complaint contained in paragraphs 1 through 25, inclusive.

27. As a result of the wrongful and illegal search and seizure of Plaintiff's property as hereinbefore alleged, Plaintiff MARK HOWLETT was immediately suspended from attending regular classes at St. Petersburg Senior High School for a period of five (5) days for violation of school regulations pertaining to possession of alcoholic beverages on school grounds.

28. The suspension of Plaintiff HOWLETT was violative of Plaintiff HOWLETT's rights under State and Federal Constitutions and laws in at least the following three (3) particulars:

a. The suspension was effected in the absence of any proof, or effort to prove, that the substance in the bottle wrongfully seized from the Plaintiff's vehicle was indeed an *alcoholic* beverage.

b. The suspension was effected in the absence of proof that the substance in question was capable of being safely consumed, and thus was a "beverage."

c. The code of Student Conduct pertaining to possession of alcoholic beverages, (c)#2, Page H-12, is devoid of any definition whatsoever of what constitutes an "alcoholic *beverage*," in that said Code fails to state whether a substance must be capable of safe consumption in order to be classified as a "beverage," thus rendering it unconstitutionally vague and incapable of being understood or obeyed by an ordinary person. The suspension in question was effected by authority of Defendant PETIT, under the authority delegated to him by Defendant GREY, Defendant ROSE and Defendant SCHOOL BOARD.

29. The acts, conduct and behavior of Defendants, and each of them, were performed knowingly and intentionally, and with reckless disregard and indifference to MARK HOWLETT's federal constitutional rights and his rights under Florida constitutional law, and other Florida law and regulations, by reason of which Plaintiff is entitled to an award of punitive damages in excess of $5,000.00.

30. Plaintiff has suffered irreparable harm and has no adequate remedy at law. Defendants will continue to engage in improper, unwarranted and illegal suspensions of students unless enjoined from doing so in the future.

WHEREFORE, Plaintiff demands judgment as follows:

A. Awarding Plaintiff compensatory damages in an amount in excess of $5,000.00.

B. Awarding Plaintiff punitive damages in an amount in excess of $5,000.00.

C. Entry of a permanent injunction enjoining the Defendants, and each of them, from effecting student suspensions for possessory offenses absent proof that the item possessed is a contraband item.

D. Award to Plaintiff attorney fees, pursuant to the provisions of Title 42 United States Code Section 1988, as well as costs and expenses of this action.

E. Any other relief deemed appropriate, equitable and just by this Honorable Court.

COUNT III

31. The Plaintiffs re-assert and re-allege each and every allegation of this Complaint contained in paragraphs 1 through 30, inclusive.

32. The Code of Student Conduct, implemented by the Defendant SCHOOL BOARD, provides under Section (8), Page H-17, entitled *Due Process Procedures*, that before a student suspension can be effected,

> 1. "Notice of Hearing required: the hearing shall consist of an informal interview betwen the principal, or his designee, and the student. *The student shall be allowed to give a personal version of the incident;*"

The suspension of MARK HOWLETT was effected by Defendent PETIT without Plaintiff HOWLETT having a meaningful opportunity to "give a personal version of the incident," in violation of the Plaintiff's rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section 9 of the Florida Constitution, the provisions of Title 42 United States Code, Section 1983, and the aforementioned Code of Student Conduct, specifically paragraph 4, Page H-6, of the aforementioned Code of Student Conduct, which states "The student shall always be treated with fundamental fairness," said Code of Student Conduct having been implemented by Defendant SCHOOL BOARD under the authority conferred by Section 230.23 (6)(c) and (d), Florida Statutes.

33. Plaintiff further states that shortly after the incident giving rise to this action occurred, Defendant PETIT received information from Plaintiff MARK HOWLETT which disclosed the existence of a material issue of fact having a direct bearing on the question of Plaintiff's

involvement in the alleged offense. Defendant PETIT made no effort whatsoever to investigate the circumstances surrounding said information, and proceeded to immediately effect the aforementioned suspension of Plaintiff.

34. The acts, conduct and behavior of Defendants, and each of them, were performed knowingly and intentionally, and with reckless disregard and indifference of MARK HOWLETT's federal constitutional rights and his rights under Florida constitutional law, and other Florida laws and regulations, by reason of which Plaintiff is entitled to an award of punitive damages in excess of $5,000.00.

35. Plaintiff has suffered irreparable harm and has no adequate remedy at law. Defendants will continue to engage in improper, unwarranted and illegal suspensions of students unless enjoined from doing so in the future.

WHEREFORE, Plaintiff demands judgment as follows:

A. Awarding Plaintiff compensatory damages in an amount in excess of $5,000.00.

B. Awarding Plaintiff punitive damages in an amount in excess of $5,000.00.

C. Entry of a permanent injunction enjoining the Defendants, and each of them, from effecting suspensions of students in violation of the rights of said students as conferred by the constitutions of the United States, the State of Florida, Title 42 United States Code, Section 1988, as well as costs and expenses of this action.

D. Award to the Plaintiff attorney fees, pursuant to the provisions of Title 42 United States Code,

Section 1988, as well as costs and expenses of this action.

E. Any other relief which may be deemed just, equitable and necessary by this Honorable Court.

[Subscription omitted in printing]

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

[Case number and title omitted in printing]

MOTION TO DISMISS

COME NOW the Defendants, the SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, SCOTT ROSE, WILLIAM GREY, AND THOMAS PETIT, pursuant to Fl.R.Civ.P. 1.140, and move to dismiss the Complaint filed in the above-styled cause, and state as grounds therefor:

1. As to all Defendants, and all counts and prayers for relief based on the law of the State of Florida, this Court has no jurisdiction over the subject matter in this dispute for the following reasons:

A. The Complaint seeks review of non-final agency action;

B. Pursuant to the Administrative Procedure Act (Chapter 120, Fla.Stat.), the only Court with jurisdiction to review agency action is the District Court of Appeal for the district in which the agency has its principal offices.

2. As to the Defendant, SCHOOL BOARD OF PINELLAS COUNTY, in all counts and prayers for relief based on U.S. Constitutional law and Title 42 § 1983 and 1988, U.S.C., this Court has no jurisdiction over the subject matter of the dispute for the following reasons:

A. A State Court can only hear claims of relief based on U.S. Constitutional law and on Title 20, § 1983 and 1988, if that Court has jurisdiction to hear such a claim based on State law;

B. The State of Florida, and its political subdivisions, has a common law immunity from civil suits not based on contract;

C. Fla.Stat. 768.28 has waived said immunity to a limited extent, but not to the extent of allowing an action based on the allegations set forth in the Complaint.

3. As to all Defendants, on all claims for injunctive relief, purporting to require the recision of Plaintiff's suspension, an expungement of any reference to the alleged incident from his records, and requesting that Defendants give MARK HOWLETT an opportunity to make up for any lost work, the Complaint fails to state a cause of action for the following reasons:

A. An injunction is an extraordinary writ, issued by a Court to prevent a party from engaging in certain conduct;

B. The allegedly illegal conduct complained of, as it relates to the claims for relief in this numbered paragraph, has already occurred and is therefore not remediable by injunctive relief;

C. The Complaint fails to allege that available administrative remedies have been utilized, or, in the alternative, that those remedies are inadequate.

4. As to all Defendants, and all counts and prayers for relief seeking to prevent future illegal searches, the Complaint fails to state a cause of action for the following reasons:

A. If the alleged search in question was in fact illegal, no injunction from any Court is necessary to prevent the type of conduct complained of from recurring;

B. Said claim of relief purports to seek protection for a class of individuals, and not the particular Plaintiffs in this cause, and the Complaint has totally failed to set forth any factors justifying a finding by this Court that Plaintiffs are qualified to represent

such a class of individuals, and has even failed to seek such a finding by this Court;

C. The Complaint fails to allege that available administrative remedies have been utilized, or in the alternative, that said administrative remedies are inadequate;

D. There is no allegation in the Complaint that the property allegedly seized by Defendants was owned by Plaintiffs, or that Plaintiffs had any proprietary interest in said property;

E. There is no allegation in the Complaint that Plaintiffs had a reasonable expectation of the privacy in the area from which the property was allegedly seized by Defendants.

5. As to all Defendants, and as to all claims of relief based on the alleged vagueness of the term "alcoholic beverage" as used in Paragraph 28 of the Complaint, the Complaint fails to state a cause of action for the following reasons:

A. The term "alcoholic beverage" is sufficiently clear in meaning, standing alone, so as to require no further definition to ensure due process of law;

B. The Complaint fails to set forth that available administrative remedies have been exhausted, or in the alternative that said administrative remedies are inadequate;

C. If students are in fact being suspended based on vague or overbroad regulations, no injunction is necessary from this Court;

D. The Complaint purports to seek protection for a class of individuals, and not for the particular Plaintiffs in this cause, and has totally failed to set forth any factors justifying a finding by this Court that Plaintiffs are qualified to represent such a class of individuals, and has even failed to seek such a finding.

6. As to all Defendants, and for all counts and prayers for relief relating to the claim that Plaintiff MARK HOWLETT was suspended without a meaningful opportunity to give a personal version of the incident, the Complaint fails to state a cause of action because of the following reasons:

A. The Complaint fails to allege that available administrative remedies have been exhausted, or in the alternative that those remedies are inadequate or futile;

B. If in fact the Defendants are suspending students without an opportunity to explain or give a version of their conduct, said suspensions would be illegal, and no injunction is necessary to prevent them;

C. The Complaint seeks protection for a class of individuals, but totally fails to set forth any factors justifying a finding by this Court that Plaintiffs are qualified to represent such a class of individuals, and even totally fails to request such a finding by this Court.

7. As to Defendant SCHOOL BOARD OF PINELLAS COUNTY, any prayer for relief involving punitive damages should be dismissed, pursuant to Florida law prohibiting punitive damages from being assessed against any political subdivision of the State of Florida;

8. As to Defendants ROSE and GREY, in addition to the grounds previously set forth, the Complaint fails to state a cause of action for the following reasons:

A. There is no allegation that either Defendant ROSE or Defendant GREY knew of or participated in the alleged search or the suspension in question prior to those events taking place;

B. There is no allegation that the alleged search or the suspension took place at the direction of either Defendant ROSE or Defendant GREY;

C. Without such prior knowledge or personal involvement, Defendants GREY and ROSE cannot be personally responsible for any allegedly illegal acts committed by others.

9. As to Defendant PETIT, on all claims for relief based on the alleged illegal suspension of Plaintiff MARK HOWLETT, the Complaint fails to state a cause of action for the following reasons:

A. The Complaint fails to allege that Defendant PETIT participated in or had any prior knowledge of the allegedly illegal suspension;

B. Without said participation or prior knowledge, Defendant PETIT cannot be held personally responsible for the allegedly illegal act.

WHEREFORE, Defendants pray that this honorable Court will enter its Order dismissing the Complaint filed herein in its entirety.

[Certificate of service and subscription omitted in printing]

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA
[Case number and title omitted in printing]

AMENDED MOTION TO DISMISS

COME NOW the Defendants, the SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA, SCOTT ROSE, WILLIAM GREY, AND THOMAS PETIT, and amend the Motion to Dismiss served on counsel for Plaintiffs on January 14, 1987, by stating the following additional grounds:

1. As to all Defendants, and all claims for relief based on the alleged illegality of the "search" of Plaintiff MARK HOWLETT's motor vehicle, the issue of the legality and constitutionality of that search has been litigated in the case of The Matter of Mark Howlett, 86-6999DLANO, by this Court, and the Circuit Court has ruled that the seizure of the bottles described in the Complaint did not violate any provision of either the Constitution of the State of Florida or the Constitution of the United States;

2. The Plaintiff fails to state a cause of action as to any allegations concerning an illegal search of Plaintiff MARK HOWLETT's car in that the alleged search, as described in the Complaint, is as a matter of law reasonable and not illegal or proscribed by any statutory or constitutional protection.

3. As to the Defendant SCHOOL BOARD, the Complaint fails to state a cause of action under any theory that would warrant punitive damages either under the law of the State of Florida or under the law of the United States.

[Certificate of service and subscription omitted in printing]

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL NO. 86-19231-9

MARK HOWLETT, a minor, by and through Elizabeth Howlett, his mother, natural guardian and next friend,
Plaintiffs,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida, WILLIAM GREY, THOMAS PETIT and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,
Defendants.

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

THIS CAUSE coming on to be heard upon the Motion to Dismiss of The School Board of Pinellas County, Florida, it is:

ORDERED that this cause is dismissed with prejudice on the authority of *Coulter* v. *Davin*, 373 So.2nd 423 (2nd DCA 1979) and *Hill* v. *Department of Corrections*, Supreme Court of Fla., Case No. 69016, 12 FLW 495.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 27 day of October, 1987.

/s/David F. Patterson
David F. Patterson,
Circuit Judge

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IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA

[Case number and title omitted in printing]

PLAINTIFFS' MOTION FOR REHEARING

The plaintiffs move for rehearing on the following grounds:

1. The Court failed to consider that the case upon which it relied in dismissing the complaint, *Hill* v. *Department of Corrections*, Supreme Court of Florida, Case No. 69016, 12 FLW 495 (September 24, 1987) involves a *state* agency which is immune from suit under Section 1983 (42 USC § 1983, the federal Civil Rights Act of 1871), whereas the present case involves a local school district, a *local* agency which is *not* immune from suit under Section 1983.

2. The court failed to consider that the *Hill* case, being grounded on the sovereign immunity of the *state* and *state agencies* from suit under Section 1983, impliedly recognized that *local* agencies, such as the Pinellas County School District in this case, are *not* immune from suit under Section 1983, whether the suit is brought in state or federal court.

3. The court, in relying upon *Coulter* v. *Davin*, 373 So.2d 423 (Fla. 2d DCA 1979), failed to consider that exhaustion of state administrative remedies is not required in a proceeding under Section 1983.

MEMORANDUM OF LAW

I

A state and its agencies are immune from suit for money damages under Section 1983 in federal court.

Quern v. *Jordan*, 440 U.S. 332 (1979). It and its agencies are also immune from such suit under Section 1983 in a state court. *Karchefske* v. *Department of Mental Health*, 143 Mich. App. 1, 371 N.W. 2d 876 (1985), and other cases cited in *Hill* v. *Department of Corrections*, *supra*. On the other hand, a *local* governmental agency, such as the Pinellas County School District in this case, is not immune under Section 1983 in federal court. *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977). Nor is it immune under Section 1983 in state court. *DeBleecker* v. *Montgomery County et al.*, 292 Md. 498, 438 A. 2d 1348 (1982).

II

Of the six cases cited by the Florida Supreme Court in its decision in *Hill*, five involve the *state* or its *agencies* as defendants, all of which were declared to be immune from suit under Section 1983 in state court. The other, *DeBleecker*, *supra*, involves a county and a *local school district* as defendants. Both local agencies were held *not* to be immune in state court.

III

Coulter v. *Davin*, *supra*, was decided under state law, the Administrative Procedure Act, Chapter 120 Fla.Stat. (1985), under which exhaustion of administrative remedies is required. On the other hand, an action may be brought under Section 1983, even though administrative remedies are available and not exhausted. *Patsy* v. *Board of Regents of Florida*, 457 U.S. 496 (1982).

CONCLUSION

The order granting the motion to dismiss should be vacated and a new order entered denying the motion to

dismiss. Any valid, remaining objection can be raised by affirmative defense in the answer.

[Subscription and certificate of service omitted in printing]

IN THE CIRCUIT COURT
FOR PINELLAS COUNTY, FLORIDA
CIRCUIT CIVIL NO. 86-19231-9

MARK HOWLETT, et al,

Plaintiffs,

v.

SCOTT ROSE, et al,

Defendants.

ORDER DENYING MOTION FOR REHEARING

This cause came on to be heard upon Plaintiffs' Motion for Rehearing, and the Court being advised in the premises, it is upon consideration

ORDERED AND ADJUDGED that said Motion be and the same is hereby denied.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this 24 day of November, 1987.

/s/David F. Patterson
David F. Patterson,
Circuit Judge

[Notation of mailing omitted in printing]

No. 87-3583

DISTRICT COURT OF APPEAL OF FLORIDA,
SECOND DISTRICT.

FEB. 1, 1989.

MARK HOWLETT, a minor, by and through Elizabeth Howlett, his mother, natural guardian and next friend,
Appellant,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,
Appellees.

CAMPBELL, Chief Judge.

This appeal on behalf of appellant, Mark Howlett, a minor, challenges the final order that dismissed with prejudice his complaint for injunctive relief and damages against the school board and several school officials. The state court action brought by appellant below was pursuant to the Judicial Civil Rights Act of 1871, 42 U.S.C. section 1983. Appellant raises three issues on this appeal:

I. **WHETHER THE QUESTION OF A STATE AND ITS SUBDIVISIONS' SOVEREIGN IMMUNITY TO AN ACTION BROUGHT IN A STATE COURT UNDER THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983, IS A QUESTION OF STATE OR FEDERAL LAW?**

II. **WHETHER UNDER FEDERAL LAW A FLORIDA SCHOOL BOARD IS IMMUNE FROM SUIT UNDER SECTION 1983?**

III. **WHETHER IT IS NECESSARY TO EXHAUST STATE REMEDIES UNDER THE FLORIDA ADMINISTRATIVE PROCEDURE ACT BEFORE BRINGING AN ACTION FOR DAMAGES IN A FLORIDA COURT UNDER SECTION 1983?**

Although our conclusion and answer to the first issue precludes the necessity of deciding the other two issues, we will briefly discuss those issues. We decide appellant's first issue on the authority of *Hill* v. *Department of Corrections, State of Florida*, 513 So.2d 129 (Fla. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1024, 98 L.Ed.2d 989 (1988), and hold that the State of Florida has not waived its sovereign immunity from suits against it in its own state courts except to the extent provided in section 768.28, Florida Statutes (1985) for traditional state tort actions. See *Hill*. Thus, to the extent that the actions of the state and its agencies are protected by sovereign immunity, an action pursuant to section 1983 will not lie in state courts. The question of whether that sovereign immunity exists is a question of state law and not federal law. The question of the scope of that sovereign immunity, or whether a particular act is protected by that sovereign immunity, is not before us on this appeal, nor was it before the trial court. In both the trial court and on appeal, appellant argued that the question of whether a state has maintained its common law sovereign immunity from a section 1983 suit in its state courts is a question of federal law. It is not. The question of whether a state has waived its own common law immunity in its own courts is a question of state law. Appellant's primary argument thus fails and the trial court judgment must be affirmed.

At oral argument, this court's decision in *Elder* v. *Highlands County Board of County Commissioners*, 497 So.2d 1334 (Fla. 2d DCA 1986) was cited in support of appellant's position. Yet, the question of the common law

sovereign immunity of a state from suit in its state courts on a federal cause of action was neither presented nor discussed in *Elder*. *Elder* was decided on the basis of Eleventh Amendment immunity. As our supreme court stated in *Hill*, relying on *Ramah Navajo School Board* v. *Bureau of Revenue*, 104 N.M. 302, 720 P.2d 1243 (App.), *cert. denied*, 479 U.S. 940, 107 S.Ct. 423, 93 L.Ed.2d 373 (1986), sovereign immunity and Eleventh Amendment immunity are distinct concepts. The eleventh amendment protects state government from the federal judiciary. Under the eleventh amendment, when a section 1983 action is brought against a state in *federal court*, the question is whether the defendant qualifies as a "person" under the act or is more properly an Eleventh Amendment protected state agency. The determination of *that* question in *that* context is a question of federal law. *However*, when a section 1983 action is brought in *state* court, the sole question to be decided on the basis of *state* law is whether the state has waived its common law sovereign immunity to the extent necessary to allow a section 1983 action in state court. *Hill* holds that Florida has not so waived its sovereign immunity. We therefore do not reach appellant's second issue in this case, i.e., whether under *federal* law a Florida school board is immune from a section 1983 law. There is no question under Florida law that agencies of the state, including school boards and municipalities, are the beneficiaries of sovereign immunity. The extent of that sovereign immunity and its applicability under Florida law in this case has not been addressed by appellant.

Neither do we reach the question of the failure of appellant to exhaust his administrative remedies inasmuch as he has not otherwise demonstrated his right to pursue his section 1983 action in Florida's courts.

While appellant has cited numerous decisions of the United States Supreme Court dealing with the nature of state agencies and their resulting immunity or lack of it in section 1983 suits, those cases are all distinguishable because they deal primarily with Eleventh Amendment immunity or actions in federal courts. *Patsy* v. *Board of Regents of State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982); *Martinez* v. *California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980); *Mt. Healthy City School Board of Education* v. *Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); *Edelman* v. *Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Moor* v. *County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942).

The one case that we would particularly distinguish is *Martinez*. While *Martinez* involved a section 1983 action in a California state court, the question of immunity in that case was based on the attempted application of a California statute that sought to immunize state officials from injuries resulting from particular conduct. In other words, it was an attempt by the state to immunize itself from a particular cause of action. *Martinez* does not pertain to the question of state common law immunity from the use of its courts for suits against the state in those state courts. The question of whether a state has opened its own courts for federal actions against the state which the state does not otherwise recognize is purely a question of state law.

AFFIRMED.

RYDER and FRANK, JJ, concur.

Supreme Court of Florida

CASE NO. 73,745

District Court of Appeal,
Second District No. 87-3583

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and friend,
Petitioner,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT AND THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,
Respondents.

WEDNESDAY, MAY 17, 1989

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, Acting C.J., SHAW, GRIMES and KOGAN, JJ., concur
MCDONALD, J., dissents

Supreme Court of the United States

No. 89-5383

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and next friend,
Petitioner

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida, et al.

ON PETITION FOR WRIT OF CERTIORARI to the District Court of Appeal of Florida, Second District.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 13, 1989

No. 89-6363 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and friend,
Petitioner,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT, and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,
Respondents.

On Writ Of Certiorari To The District Court of Appeal Of Florida Second District

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PETITIONER'S BRIEF

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QUESTION PRESENTED

Whether the Supremacy Clause is violated by Florida's decision to shield a local school board and its officials from liability under 42 U.S.C. § 1983 by enforcing, in its state courts, a rule of state sovereign immunity that is not recognized by federal law and that would not apply if the very same lawsuit were brought in federal court?

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OPINIONS BELOW

The orders of the Circuit Court for Pinellas County dismissing petitioner's complaint with prejudice, (J.A.19), and denying rehearing, (J.A.23), are unreported. The opinion of the District Court of Appeal for the Second District, (Pet.App.1), is reported at 537 So.2d 706 (2d DCA 1989). The order of the Florida Supreme Court denying discretionary review, (Pet.App.4), is reported at 545 So.2d 1367 (1989).

JURISDICTION

The order of the Florida Supreme Court was entered on May 17, 1989, and the petition for a writ of *certiorari* was granted on November 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

The appendix to this brief contains the relevant text of the following statutes and constitutional provisions: Article VI of the United States Constitution; 42 U.S.C. § 1983; and Fla.Stat. § 768.28.

STATEMENT OF THE CASE

Petitioner Mark Howlett was a student in good standing at St. Petersburg High School in Pinellas County, Florida, when he drove his 1966 Volkswagen to school on the morning of October 9, 1986. (J.A.4).[1] The car was legally parked and locked on school property. *Id.* Apparently, it was also blocking the path of several construction vehicles temporarily working nearby. (J.A.5). When this

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[1] Citations are to petitioner's complaint, which must be accepted as true in reviewing the grant of a motion to dismiss under both Florida and federal law. *See Fletcher* v. *Williams*, 153 So.2d 759 (1st DCA 1963); *Conley* v. *Gibson*, 355 U.S. 41 (1957).

fact was discovered later in the morning, Thomas Petit, an assistant principal at the school and respondent herein, was summoned to the parking lot. He promptly broke into petitioner's car through the side vent window, ostensibly to look for registration papers and identify the driver. (J.A.4).

The record does not explain why Petit chose to break into petitioner's car rather than broadcast its license plate number over the school's public address system. (J.A.5-6). The record also does not explain why Petit continued to search petitioner's car even after finding the registration papers he was seeking. (J.A.4). What is clear is that, as a result of his search, Petit discovered and seized four bottles from petitioner's car: three were empty wine cooler bottles; the fourth contained an unconsumed residue of eggnog that Petit believed might have some alcohol in it. (J.A.5).[2] Based solely on this "evidence," petitioner was immediately suspended from regular classes for five days under a school rule that prohibits students from drinking or possessing alcoholic beverages on school premises. (J.A.6).

Shortly thereafter, petitioner filed this action in the Florida state courts alleging, *inter alia*, a violation of his constitutional rights under 42 U.S.C. § 1983.[3] The complaint contained three counts. In the first count, petitioner alleged that respondents violated his Fourth Amendment right to be free from unreasonable searches and seizures. (J.A.6). In the second count, petitioner alleged that his suspension was unsupported by any credible evidence and thus violated the substantive due process guarantees of the Fourteenth Amendment. (J.A.8-9). In the third count, petitioner alleged that his procedural due process rights were abridged by the absence of any meaningful hearing. (J.A.10). As relief, petitioner sought compensatory and punitive damages. He also sought injunctive relief, including a request to expunge any reference to the suspension from his school records.

In lieu of an answer, respondents filed a motion to dismiss. The motion was granted by the Circuit Court in a one sentence order, (J.A.19),[4] and then affirmed by the District Court of Appeal in a brief two page opinion. (Pet.App.1). Both courts relied heavily on *Hill* v. *Dep't of Corrections*, 513 So.2d 129 (1987), *cert. denied*, 108 S.Ct. 1024 (1988), a decision of the Florida Supreme Court which holds that the state itself may not be sued in a § 1983 action in the state courts. Construing *Hill* in the broadest possible fashion, the District Court of Appeal wrote:

> . . . to the extent that the actions of the state and its agencies are protected by sovereign immunity, an action pursuant to section 1983 will not lie in state courts. The question of whether that sovereign immunity exists is a question of state law and not federal law.

(Pet.App.2).

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[2] Petit's suppositions about the eggnog were never verified. (J.A.28-29).

[3] The complaint alleged that respondent Petit was acting at all material times "under the authority conferred upon" him by his superiors. (J.A.5). The complaint therefore named as additional defendants: the Pinellas County School Board; Scott Rose, the Superintendent of Schools for Pinellas County; and William Grey, the principal of St. Petersburg High School.

[4] Petitioner's request for rehearing was denied without opinion. (J.A.23).

The court recognized that its ruling might lead to different results depending on whether a § 1983 action is brought in state or federal court. It concluded, however, that such asymmetrical outcomes were not a cause for concern:

> Under the eleventh amendment, when a section 1983 action is brought against a state in *federal court*, the question is whether the defendant qualifies as a "person" under the act or is more properly an Eleventh Amendment protected state agency. The determination of *that* question in *that* context is a question of federal law. *However*, when a section 1983 action is brought in *state* court, the sole question to be decided on the basis of *state* law is whether the state has waived its common law sovereign immunity to the extent necessary to allow a section 1983 action in state court. *Hill* holds that Florida has not so waived its sovereign immunity. We therefore do not reach appellant's second issue in this case, i.e., whether under *federal* law a Florida school board is immune from a section 1983 law [sic]. There is no question under Florida law that agencies of the state, including school boards and municipalities, are the beneficiaries of sovereign immunity.

(Pet.App.3) (emphasis in original).[5]

Petitioner appealed to the Florida Supreme Court, arguing that the decision of the District Court of Appeal

[5] Petitioner raised three issues on appeal in the Florida courts: (1) whether the scope of sovereign immunity in a § 1983 action brought in state court is a question of state or federal law; (2) whether federal law immunizes a local school board from suit under § 1983; and (3) whether it is necessary to exhaust administrative remedies before bringing a § 1983 action for damages in the Florida courts. (Pet.App.2). Only the first issue was reached by the court below. As indicated above, its disposition of that issue was sufficient to dispose of the case in respondents' favor.

was inconsistent with § 1983 and misapplied *Hill*. With one judge dissenting, the Florida Supreme Court denied discretionary review. (Pet.App.4).

SUMMARY OF ARGUMENT

The issue in this case is whether a state may provide its local governmental units with an absolute immunity against § 1983 actions brought in state court that is clearly inconsistent with, and less generous than, the immunity rules applied to § 1983 actions in federal court. This seemingly technical inquiry has important substantive consequences. If respondents prevail, the outcome of § 1983 litigation will often turn on whether a state or federal forum is selected. To the extent that the states provide greater protection for constitutional rights than federal law would otherwise require, this diversity is not a problem and should be encouraged. But to the extent that the states provide less protection for constitutional rights, as Florida did in this case, the core values of the Supremacy Clause are directly at stake.

Recognizing that fact, this Court has consistently rejected any state rule that undermines the broad remedial purposes of § 1983. *E.g.*, *Felder* v. *Casey*, 108 S.Ct. 2302 (1988). More particularly, this Court has consistently looked at § 1983 itself rather than state law in resolving a broad array of immunity questions over the past two decades. *E.g.*, *Owen* v. *City of Independence*, 445 U.S. 622 (1980). Indeed, this Court has never viewed state law as the source of an immunity defense under § 1983, even when the § 1983 action was initially brought in state court. *See Martinez* v. *California*, 444 U.S. 277 (1980).

It is worth emphasizing the broad scope of the immunity defense that respondents assert in this case. It is not

limited to the state and its agencies. *Cf. Will* v. *Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989). Rather, it extends to cities and counties that are clearly subject to suit in a § 1983 action brought in federal court. *Monell* v. *Dep't of Social Services*, 436 U.S. 658 (1978). Given the distrust for state courts evident throughout the legislative history of § 1983, it is inconceivable that the 42nd Congress intended to confer a broader authority on the states to immunize the unconstitutional policies of cities and counties than it conferred on the federal courts. The federalism interests work in petitioner's favor rather than respondents' under these circumstances. *See Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239 (1942).

What is not clear from the decision below is whether it also bars § 1983 actions against state officers in their individual capacity. Absent a more authoritative statement, this Court should not quickly leap to that conclusion. On the other hand, the decision below cannot stand even if it is construed as an absolute jurisdictional barrier against all § 1983 claims in the Florida courts. At the very least, the existence of concurrent jurisdiction means that the Florida courts may not enforce substantive rules that discriminate against § 1983 suits. *See Testa* v. *Katt*, 330 U.S. 386 (1947). Yet, that is precisely what Florida has done by waiving sovereign immunity for all tort claims other than the constitutional torts embraced by § 1983.

Finally, the state's obligation to enforce federal law does not end with nondiscrimination. Petitioner recognizes that this Court has never definitively resolved whether a state must exercise the concurrent jurisdiction granted by § 1983. But this Court has ruled in other contexts that the states may not decline to exercise jurisdiction over federal claims because they disagree with the

policy choices inherent in federal law. *See Mondou* v. *New York, N.H.&H. R.R.*, 223 U.S. 1 (1912). The attempt to interpose a sovereign immunity defense on the facts of this case represents just such a policy disagreement. Florida may not believe that its cities and counties should be held liable for their constitutional violations; Congress has decided otherwise. Like every other state in the union, Florida is now bound by that congressional decision. *See General Oil* v. *Crain*, 209 U.S. 211 (1908).

ARGUMENT

I. THE SCOPE OF ANY IMMUNITY DEFENSE UNDER § 1983 IS GOVERNED BY FEDERAL LAW REGARDLESS OF THE FORUM IN WHICH THE CASE IS BROUGHT

In the nearly three decades since *Monroe* v. *Pape*, 365 U.S. 167 (1961), this Court has decided numerous immunity cases under § 1983. *See e.g.*, *Forrester* v. *White*, 108 S.Ct. 538 (1988); *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982); *Owen* v. *City of Independence*, 445 U.S. 622 (1980); *Monell* v. *Dep't of Social Services*, 436 U.S. 658 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, 386 U.S. 547 (1967). Every one of those cases was decided by reference to the meaning and history of the federal statute. Not one was decided on the basis of state law. Respondents nevertheless contend that state law alone determines the scope of sovereign immunity in a § 1983 action brought in state court. This Court's decisions do not support that contention. Indeed, this Court has expressly rejected the very position that respondents now press on at least two separate occasions. *See generally*, Steinglass, *Section 1983 Litigation in State Courts*, § 15.2(d)(1) (1988).

A. The Decision Below Is Inconsistent With The Established Precedents Of This Court

In *Martinez* v. *California*, 444 U.S. 277 (1980), the relatives of a 15 year old girl murdered by a parolee brought a § 1983 action in the California courts against the parole officers who authorized the murderer's release. In response, defendants cited a California statute that provides absolute immunity for parole release decisions. The California courts accepted that defense. This Court, however, unanimously declared "that the California immunity statute does not control this claim even though the federal cause of action is being asserted in the state courts." *Id.* at 284.[6] In an explanatory footnote, Justice Stevens elaborated on the Court's reasoning:

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced . . . . The immunity claim raises a question of federal law.

Id. at 284 n.8, *quoting Hampton* v. *City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974).

Two years ago, in *Felder* v. *Casey*, 108 S.Ct. 2302 (1988), the Court relied on similar reasoning to hold that Wisconsin's notice of claim provision could not be applied to § 1983 actions filed in the state courts:

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[6] Defendants in *Martinez* ultimately prevailed on the alternative ground that plaintiffs had failed to state a due process claim for relief. 444 U.S. at 283-85.

> [A] state law that immunizes government conduct otherwise subject to suit under § 1983 is pre-empted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy, which of course already provides certain immunities for state officials.

Id. at 2307 (citation omitted).[7]

The nature of those immunities was fully explored in *Owen* v. *City of Independence*, 445 U.S. 622 (1980). In particular, *Owen* contains the Court's most extended discussion of the relationship between sovereign immunity and § 1983. That discussion was provoked by the claim of the municipal defendant, who argued that § 1983 did not override the common law distinction between "governmental" and "proprietary" activities, and that when acting in its "governmental" capacity a municipality is therefore entitled to a good faith defense in § 1983 actions. This Court disagreed in an opinion that does not distinguish between state and federal court actions under § 1983. Rather, the Court looked to the purposes of § 1983 in holding:

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[7] The decision below is also inconsistent with the approach followed last Term in *Will* v. *Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989). The majority opinion in *Will* spent considerable time reviewing the language and history of the Civil Rights Act of 1871 as support for its conclusion that states are not "persons" under § 1983. Nothing in the Court's opinion even remotely suggests that sovereign immunity can provide an independent defense to § 1983 actions brought in state court against local governmental entities that qualify as "persons" under the federal statute. To the contrary, the Court explicitly distinguished states from localities for purposes of suit under § 1983 without any indication that the outcome of a § 1983 lawsuit against local government could permissibly turn on whether the action was filed in state or federal court. *Id.* at 2310 n.7.

> the municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of "persons" subject to liability for violation of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed.

445 U.S. at 647-48 (footnote omitted).

The *Owen* Court further noted that "[m]unicipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law." *Id.* at 647 n.30.[8] As support for this proposition, the Court cited the same passage from *Hampton* v. *Chicago* that it had relied on in *Martinez* when discussing the inapplicability of state law defenses in § 1983 actions filed in state court. *See* p.8, *supra*. While not dispositive, the parallel use of an identical precedent in two cases decided only a few months apart strongly suggests that the Court did not perceive, in either *Martinez* or *Owen*, that the supremacy of federal law turned on whether the § 1983 action was brought in federal or state court. *See also Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455-56 (1976).

Nor should it. This Court has already decided that state courts have concurrent jurisdiction over § 1983 claims.

[8] The existence *vel non* of an immunity defense under § 1983 has been treated by this Court as an issue of statutory construction. *See Briscoe* v. *LaHue*, 460 U.S. 325, 326 (1983). The Court's immunity cases have therefore focused on the history and purposes of the federal statute almost without reference to state law. *E.g.*, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). In this case, however, the result would be the same even if one started the analysis with Florida's immunity rules. *See* Herman, "Beyond Parity: Section 1983 and the State Courts," 54 Brooklyn L.Rev. 1057, 1079 n.94 (1989). Pursuant to 42 U.S.C. § 1988, those rules could only be sustained if they were compatible with § 1983. That judgment would ultimately be a matter of federal law. *Cf. Wilson* v. *Garcia*, 417 U.S. 261 (1985).

E.g., *Maine* v. *Thiboutot*, 448 U.S. 1, 3 n.1 (1980). When exercising that jurisdiction, states may not adopt either substantive or procedural rules that conflict with the remedial purposes of § 1983. *Cf. Smith* v. *Wade*, 461 U.S. 30, 55 n.23 (1983) (the scope of § 1983 is a matter of federal law regardless of forum). Thus, "[f]ederal law takes state courts as it finds them only insofar as those courts employ rules that do not 'impose unnecessary burdens upon rights of recovery authorized by federal laws.'" *Felder*, 108 S.Ct. at 2313, *quoting Brown* v. *Western Ry.*, 338 U.S. 294, 298-99 (1949). This is because the Supremacy Clause imposes a constitutional duty on state courts "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected." *Garrett* v. *Moore-McCormack*, 317 U.S. 239, 245 (1942). The assertion of a sovereign immunity defense that is only available in state court plainly does not preserve "all the substantial rights" of a § 1983 plaintiff under federal law.

B. Respondents Would Not Be Shielded By A Sovereign Immunity Defense In Federal Court

There is little doubt that this case could go forward against all respondents, including the district school board, had it been brought in federal court. The Eleventh Amendment bar to federal jurisdiction does not apply to local government units. *See Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U.S. 274, 280 (1977); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976); *County of Lincoln* v. *Luning*, 133 U.S. 529 (1890). And, after *Monell*, local government units clearly qualify as "persons" for purposes of suit under § 1983.[9]

[9] By dismissing the case on sovereign immunity grounds, the lower courts never reached the question of whether the constitutional violations alleged in this case took place pursuant to a policy or practice that would give rise to liability under *Monell*. That question remains to be explored on remand.

Monell itself involved an issue of municipal liability. This Court, however, has never distinguished between cities and counties in its § 1983 decisions. To the contrary, the Court has often linked the two in discussing the scope of the federal statute. There are sound historical reasons for the Court's approach. Under the Dictionary Act of 1871,[10] the use of the term "person" in § 1983 extended to "public corporations," a phrase that was commonly understood at the time to "include [ ] towns, cities, and counties, but not States." *Will* v. *Michigan Dep't of State Police*, 109 S.Ct. at 2311 n.9.[11] In similar fashion, the controversial Sherman Amendment, which figured so prominently in the debates over § 1983, assumed an equality of status between cities and counties. If adopted, it would have imposed vicarious liability on cities and counties alike for civil rights deprivations caused by their residents. *Monell*, 436 U.S. at 667.

This history, moreover, is amply supported by recent practice. Over the past two decades, this Court has entertained numerous § 1983 suits against local school boards and their officials. *E.g.*, *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988); *Bethel School District* v. *Fraser*, 478 U.S. 675 (1986); *Board of Education* v. *Pico*, 457 U.S. 853 (1982); *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). Those cases make clear that the jurisdictional question in federal court is whether a local school board "is more like a county or city than it is like an arm of the State." *Mt. Healthy City School District* v. *Doyle*, 429 U.S. 274, 280 (1977). That question, in turn, depends on an interpreta-

[10] Act of Feb. 25, 1871, § 2, 16 Stat. 431.

[11] In both *Will* and *Monell*, this Court looked to the Dictionary Act as an important interpretive guide to § 1983.

tion of the Eleventh Amendment that may be affected by state law but is ultimately governed by federal principles. Here, as in *Mt. Healthy*, the school board is authorized by state law to issue bonds, Fla.Stat. § 236.37, and levy taxes, Fla.Stat. § 236.25. Those independent powers are sufficient to confer federal jurisdiction in a § 1983 suit. *Mt. Healthy*, 429 U.S. at 280.[12]

Finally, it is indisputable that respondents, other than the county school board, could be sued in their individual capacities in federal court regardless of any immunity that might attach to the county school board in its corporate capacity. *See Ex Parte Young*, 209 U.S. 123 (1908).[13] As described more fully below, it is not entirely apparent whether such individual capacity suits are permitted in the Florida courts by the decision in this case. *See* Point IIA, *infra*. Under federal law, however, such suits are plainly permitted so long as any damage award is paid by the individual defendants and not by the state treasury. *Cf. Kentucky* v. *Graham*, 473 U.S. 159 (1985).

In short, petitioner's substantive rights would have been significantly different had this case been filed in federal court.

C. The Decision Below Is Inconsistent With The History And Purpoees Of § 1983

"A major factor motivating the expansion of federal jurisdiction through [§ 1983] was the belief of the 1871

[12] In *Mt. Healthy*, as in this case, local school boards were deemed "political subdivisions" of the state. 429 U.S. at 280. However, that fact was not controlling in *Mt. Healthy* and should not be controlling here.

[13] The complaint in this case does not specifically indicate whether the individual respondents are being sued in their individual or official capacities. That is not unusual and should not foreclose recovery if petitioner can show at trial that respondents were personally liable for any constitutional violations that occurred.

Congress that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 505 (1982). That distrust was targeted as much at state courts as it was at state law enforcement. *Id.* at 506 & n.9. Given this history it defies commonsense to argue, as respondents must in this case, that the 42nd Congress intended to defer to the authority of the states to shield state officials from § 1983 liability through the imposition of state common law immunities.[14]

For reasons this Court discussed at length in *Owen*, respondents' reliance on sovereign immunity is also at odds with the compensatory purposes of § 1983. If the sovereign cannot be sued, there will often be no meaningful remedy for those who suffer as a result of the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ." *United States* v. *Classic*, 313 U.S. 299, 326 (1941). The fact that the offending officer can be personally sued does not solve the problem. "[O]wing to the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to

[14] Presented with an analogous contention in *Felder*, this Court observed:

> Given the evil at which the federal civil rights legislation was aimed, there simply is no reason to suppose that Congress meant "to provide these individuals immediate access to the federal courts notwithstanding any provision of state law to the contrary," yet contemplated that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries.

108 S.Ct. at 2311 (footnote omitted) (citations omitted).

assert a good-faith defense." *Owen*, 445 U.S. at 651 (citation omitted). Here, of course, the problem is magnified by the absolute immunity that respondents propose for all government bodies sued in state court.

In addition, it is no answer that petitioner could have filed his § 1983 action in federal court and avoided the difficulties that he has encountered in this case. The same is true every time the state erects a barrier to the vindication of federal rights in state court. Petitioner had a right to choose his forum and having chosen state court he had a right to insist that the state court respect the ultimate supremacy of federal law, *see Martinez* v. *California*, including the interest in uniformity that this Court has identified as an important aspect of supremacy under the civil rights statutes.

"A law that predictably alters the outcome of § 1983 claims depending solely on whether they are brought in state or federal court is obviously inconsistent with this federal interest in intra-State uniformity." *Felder*, 108 S.Ct. at 2314. Yet, that is precisely the impact of the immunity rules applied by the court below. Under those rules, "the outcome of federal civil rights litigation will frequently and predictably depend on whether it is brought in state or federal court." *Id.* at 2313.[15] Faced

[15] The obverse is equally true, as *Felder* points out. When federal courts exercise diversity jurisdiction over state law claims, "the outcome of the litigation should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945). Thus, as *Felder* recognized, the supremacy issue presented by this case is, in many ways, a reverse *Erie* problem. 108 S.Ct. at 2313. Neither *Felder* nor this case, however, forecloses a state court from treating § 1983 actions more liberally than a federal court. *Id.* At the very least, different policy considerations would apply under those circumstances. *See generally*, Herman, *supra* n.8.

with that prospect, the *Felder* Court held:

> [T]he very notions of federalism upon which respondents rely dictate that the State's outcome- determinative law must give way when a party asserts a federal right in state court.

Id.

This case is governed by the same principle.[16]

II. THE DECISION BELOW MUST BE REVERSED EVEN IF IT IS VIEWED AS A JURISDICTIONAL BAR TO § 1983 SUITS IN THE STATE COURTS

As described more fully below, it does not appear that the Florida courts have declined jurisdiction over § 1983 claims. Rather, it appears that the Florida courts have decided to entertain *only* those § 1983 actions that are deemed compatible with the state's own definition of sovereign immunity. Such selective enforcement of federal law is invalid under *Felder* and *Martinez*. It is unnecessary, therefore, to reach the question of whether a state could decline § 1983 jurisdiction entirely.[17] However, even if this case is approached in jurisdictional terms, the decision below cannot stand. First, it violates the principle of nondiscrimination. Second, it reflects a policy disagreement between state and federal law that must be resolved in favor of the federal interest under the Supremacy Clause.

A. The Decision Below Does Not, On Its Face, Foreclose Jurisdiction Over § 1983 Claims

The decision below is hardly a model of clarity. Thus, it is difficult to say with great assurance how far the sovereign immunity defense accepted by the court below may actually extend. For present purposes, it is sufficient to note that it bars § 1983 suits in state court against cities, counties and local school boards. So far as one can tell, it also departs from this Court's Eleventh Amendment jurisprudence by barring injunctive relief against state officials engaged in an ongoing violation of constitutional rights. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974). It does not, on its face, bar jurisdiction over § 1983 claims. But it does indisputably foreclose whole categories of § 1983 litigation that are routinely prosecuted in the federal courts.

[16] For similar reasons, the limits on liability embodied in Fla.Stat. § 768.28(5) should be deemed inapplicable in state court § 1983 actions.

[17] *See Martinez*, 444 U.S. at 283 n.7.

The justification for this asymmetrical result ostensibly rests on the decision by the Florida Supreme Court in *Hill* v. *Dep't of Corrections*, 513 So.2d 129 (1987). In fact, the immunity principles applied in this case by Florida's intermediate appellate court go far beyond anything *Hill* actually decided. The narrow issue in *Hill* was "whether a civil rights suit under 42 U.S.C. § 1983 can be brought against the state and one of its agencies in a Florida court." *Id.* at 131. Writing prior to *Will*'s holding that states are not persons under § 1983, *Hill* analyzed that question in terms of the state's traditional sovereign immunity. In particular, the *Hill* court found no reason to believe that the drafters of § 1983 intended the states to suffer *greater* liability in state court than federal court. And since a suit against the state (or one of its agencies) would be barred in federal court under the Eleventh Amendment, the *Hill* court concluded that it was likewise barred in state court under the doctrine of sovereign immunity. The court also disposed of the question of waiver, by stating:

> While Florida is at liberty to waive its immunity from section 1983 actions, it has not done so. The recovery

> ceilings in section 768.28 were intended to waive sovereign immunity for state tort actions, not federal civil rights actions commenced under section 1983.

513 So.2d at 133.[18]

The careful analogy in *Hill* between sovereign immunity and the Eleventh Amendment does not on its face support the ruling below, which extended the concept of sovereign immunity in § 1983 actions to cities, counties, and local school boards. Rather, that extension appears to be based on the lower court's assumption that the language of § 768.28 determines, through negative implication, the scope of the sovereign immunity defense to a § 1983 action in the Florida courts. Because § 768.28 expressly waives the immunity of the state, its agencies, and "subdivisions," the court below apparently reasoned that these same entities are, *ipso facto*, insulated from suit in circumstances where sovereign immunity has not been waived—namely, § 1983 suits.[19]

Petitioner recognizes that this Court cannot resolve disputed questions of state law. Nevertheless, the uncer-

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[18] The relevant text of Fla.Stat. § 768.28 is set out in the Appendix. *Cf. Florida Dep't of Health and Rehabilitative Services* v. *Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (Florida's "general waiver of sovereign immunity" is not a waiver of its Eleventh Amendment immunity).

[19] This has not been the uniform view of the Florida courts. *See e.g., The Franklin County School Board* v. *Page*, 540 So.2d 891 (1st DCA 1989) (holding that local government units do not enjoy a sovereign immunity from § 1983 suits in the state courts); *City of Riviera Beach* v. *Langevin*, 522 So.2d 857 (4th DCA 1988) (same); *Southern Alliance Corp.* v. *City of Winter Haven*, 505 So.2d 484 (2d DCA 1987) (same). *But see Lloyd* v. *Ellis*, 520 So.2d 59 (1st DCA 1988) (dismissing suit against county sheriff and investigator in their official capacities).

tain foundation of the decision below cautions against a broad reading that would also foreclose, *sub silentio*, § 1983 actions against government officials in their individual capacities. Neither *Hill* nor the decision in this case addressed that question directly. Under the circumstances, it is far more reasonable to assume that petitioner's complaint was dismissed in its entirety because the court below assumed, improperly in our view, that respondents were sued in their official capacities only.[20] That interpretation would also be consistent with the decision of other Florida appellate courts that have adhered to the distinction between individual and official capacity suits under § 1983. *See Lloyd* v. *Ellis*, 520 So.2d 59, 60 (1st DCA 1988); *Skoblow* v. *Ameri-Manage, Inc.*, 483 So.2d 809 (3d DCA 1986), *aff'd on other grounds*, 514 So.2d 1077 (1987).[21] It is also consistent with the structure of § 768.28. Under that section of Florida law, government employees cannot be sued if a cause of action is available against their employer. If the government employer is immune from suit, as the court below held in this case, then the bar against suing the employee presumably disappears as well. At the moment, therefore, the fairest reading of Florida law seems to be that the state courts remain open to § 1983 suits against individual officers but closed (at least in the Second District) to

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[20] *See* n.3, *supra*.

[21] Even more significantly, the Second District Court of Appeal, which issued the opinion below, has reviewed other individual capacity suits under § 1983 both before and since this case without relying on the doctrine of sovereign immunity. *See P.C.B. Partnership* v. *The City of Largo*, 549 So.2d 738 (2d DCA 1989); *Carpenter* v. *City of St. Petersburg*, 547 So.2d 339 (2d DCA 1989); *Penthouse, Inc.* v. *Saba*, 399 So.2d 1095 (2d DCA 1981).

§ 1983 suits against *any* governmental body under an expansive view of sovereign immunity.[22]

B. States May Not Enforce Jurisdictional Rules That Discriminate Against Federal Claims

If construed in jurisdictional terms, the ruling below represents the starkest example of state discrimination against federal claims that this Court has ever reviewed. As explained by the Florida Supreme Court in *Hill*, the doctrine of sovereign immunity retains its validity in Florida only for constitutional torts. 513 So.2d at 132-33. They alone are barred. For all other torts, the state has waived its sovereign immunity pursuant to Fla.Stat. § 768.28.[23]

The scope of this partial waiver was aptly summarized by the Eleventh Circuit in *Gamble* v. *Florida Dep't of Health and Rehabilitative Services*, 779 F.2d 1509, 1515 (11th Cir. 1986): "We agree . . . that § 768.28, when viewed alone, was intended to render the state and its agencies liable for damages for traditional torts under state law, but to exclude such liability for 'constitutional torts.'" Five years earlier, the district court was even

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[22] The Florida courts have also continued to review on the merits applications for attorney's fees under 42 U.S.C. § 1988. *E.g.*, *Steinberg* v. *City of Sunrise*, 545 So.2d 424 (4th DCA 1989); *Hoffmeister* v. *Coler*, 544 So.2d 1067 (4th DCA 1989); *The Franklin County School Board* v. *Page*, 540 So.2d 891 (1st DCA 1989). That response is inconsistent with the notion that the Florida courts have declined jurisdiction to hear all § 1983 claims.

[23] This discrepancy would not be critical for § 1983 had the doctrine of sovereign immunity been limited to damage claims against the state and its agencies. Under those circumstances, the decision in *Hill* would have done little more than presage this Court's opinion in *Will*. It becomes absolutely critical in light of the lower court's ruling that the doctrine of sovereign immunity also extends to cities, counties, and local school boards.

more explicit in *Shinholster* v. *Graham*, 527 F.Supp. 1318, 1332 (N.D.Fla. 1981): "[T]he Florida legislature's intent to limit the waiver of sovereign immunity solely to tort claims and to the exclusion of federal civil rights suits is abundantly clear." As a result, a resident of Florida who is run over by a police car may sue the city for negligence. A resident of Florida who is unconstitutionally searched pursuant to municipal policy has no recourse against the municipality in the Florida courts.

Such differential treatment of state and federal claims violates a principle of nondiscrimination that is more than fifty years old. In *McKnett* v. *St. Louis & S.F. Railway*, 292 U.S. 230 (1934), the Alabama courts declined to exercise jurisdiction over an out-of-state accident under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*, although foreign corporations were generally permitted access to the Alabama courts for actions arising under the laws of other states. This Court reversed in an opinion written by Justice Brandeis:

> While Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act, the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law. The denial of jurisdiction by the Alabama court is based solely upon the source of law sought to be enforced. The plaintiff is cast out because he is suing to enforce a federal act. A state may not discriminate against rights arising under federal laws.

292 U.S. at 233-34 (citations omitted).

The Court reached a similar conclusion in *Testa* v. *Katt*, 330 U.S. 386 (1947). The plaintiff in *Testa* brought suit in the Rhode Island state courts to recover the purchase

price of an automobile that was above and beyond the wartime price controls set by the Emergency Price Control Act. The trial court awarded treble damages plus attorney's fees. The Rhode Island Supreme Court, however, concluded that it lacked jurisdiction to enforce the "penal" statutes of a "foreign government" notwithstanding the fact that similar statutes enacted by Rhode Island were routinely enforced in its state courts. Once again, this Court disagreed:

> It is conceded that this same type of claim arising under Rhode Island law would be enforced by that State's courts . . . Thus the Rhode Island courts have jurisdiction adequate and appropriate under established local law to adjudicate this action. Under these circumstances the State courts are not free to refuse enforcement of petitioners' claim.

Id. at 394 (footnotes omitted).[24]

Most recently, in *Felder*, the discriminatory impact of Wisconsin's notice of claim provision was cited by the Court as one of the reasons for its invalidity. 108 S.Ct. at 2308. The discrimination there was not against federal claims *per se;* rather, it was a discrimination in favor of governmental defendants who, the Court noted, were "the very persons and entities Congress intended to subject to liability" through § 1983. *Id.* at 2310. "This defendant-specific focus of the notice requirement," the Court wrote, "serves to distinguish it, rather starkly, from rules uniformly applicable to all suits." *Id.*

The discrimination in this case suffers the worst defects of *McKnett* and *Testa*, on the one hand, and *Felder*, on the

[24] The holding in *Testa* was expressly reaffirmed in *Federal Energy Regulatory Commission (FERC)* v. *Mississippi*, 456 U.S. 742, 760 (1982).

other. Like *McKnett* and *Testa*, the ruling below carves an exception from the general jurisdiction of the state courts that only applies to certain federal claims. And like *Felder*, the ruling below insulates from liability the very defendants that § 1983 was designed to reach. Neither discrimination is valid; both together are fatal to Florida's scheme.

C. States May Not Enforce Jurisdictional Rules That Reflect A Substantive Disagreement With Policies Inherent In Federal Law

A state's obligation to enforce federal law does not end with nondiscrimination. Although this Court has never definitively resolved whether a state must exercise the concurrent jurisdiction granted by § 1983,[25] the principles governing that judgment are well-established. Absent a "valid excuse," Florida may not decline to hear federal claims because it regards its own state interests as superior to federal law.[26] And a state's substantive disagreement with federal law does not represent a "valid excuse."[27]

These benchmarks were most clearly set forth in *Mondou* v. *New York, N.H. & H. Railroad*, 223 U.S. 1 (1912). The Connecticut courts in that case had refused to accept

[25] *See Maine* v. *Thiboutot*, 448 U.S. at 3 n.1; *Martinez* v. *California*, 444 U.S. at 283 n.7.

[26] *See* Bator, Meltzer, Mishkin & Shapiro, *Hart and Wechsler's Federal Courts and the Federal System* 499 (1988).

[27] Steinglass, *supra*, at § 9.3(c). Applying these rules, many commentators have concluded that the states are required to hear § 1983 claims. *E.g.*, Gordon & Gross, "Justiciability of Federal Claims in State Court," 59 Notre Dame L.Rev. 1145, 1156-71 (1984); Neuborne, "Toward Procedural Parity in Constitutional Litigation," 22 Wm. & Mary L.Rev. 725, 759-66 (1981).

jurisdiction over FELA claims on the ground that the theory of liability embodied in the Act was inconsistent with state policy and that, as a result, it would be confusing for state judges to apply two different theories of liability depending on whether a state or federal claim was advanced. In an era when the theory of coordinate sovereignty still carried force, *see Kentucky* v. *Dennison*, 65 U.S. 66 (1861), this Court nonetheless rejected Connecticut's approach:[28]

> The suggestion that the act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.

223 U.S. at 57.[29] Thus, the Court concluded: "The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." *Id.* at 58.

General Oil Co. v. *Crain*, 209 U.S. 211 (1908), reflects a similar view. Indeed, it is perhaps even more directly on

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[28] The theory of coordinate sovereignty held that states heard federal actions solely as a matter of comity. It was expressly rejected in *FERC* v. *Mississippi*, 456 U.S. at 763 n.28.

[29] *See also Claflin* v. *Houseman*, 93 U.S. 130, 136 (1876) (federal and state governments may be distinct sovereignties but that "is no reason why the State Courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent, and not denied").

point because, like the present case, it involved the assertion of sovereign immunity as a basis for declining state jurisdiction over a federal constitutional claim. The issue arose in a suit seeking to enjoin Tennessee officials from collecting a local tax that plaintiff contended impermissibly burdened interstate commerce. The validity of the tax was ultimately upheld. But in an opinion issued on the same day as *Ex Parte Young*, 209 U.S. 123 (1908), this Court refused to accept Tennessee's sovereign immunity defense:

> If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation.

209 U.S. at 226.[30]

Here, the only plausible justification for Florida's use of an expansive sovereign immunity defense to bar petitioner's § 1983 claim is that Florida disagrees with the federal policy decision to make local governments liable for the constitutional violations their policies create. *Felder* provides the short answer to that objection:

> The decision to subject state subdivisions to liability for violations of federal rights . . . was a choice that Congress, not the [Florida] legislature, made, and it

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[30] *Crain* cannot be dismissed as a case in which no forum would have been available if the state courts were closed. The Court's simultaneous decision in *Ex Parte Young* assured that the federal courts would be available to hear constitutional claims against state officials.

> is a decision that the State has no authority to override. Thus, however understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation, as are the means the State has chosen to effectuate it.

108 S.Ct. at 2309.

In fact, this is a more compelling case than *Felder* since, in *Felder*, it was at least theoretically possible to have a § 1983 claim heard in its entirety in the state courts so long as one complied with the notice of claim provisions. That possibility did not exist for petitioner in this case. The invalidity of such a total ban was therefore assumed in *Felder*, when the Court said:

> States . . . may no more condition the federal right to recover for violations of civil rights than *bar that right altogether*, particularly where those conditions grow out of a waiver of immunity which, however necessary to the assertion of state-created rights against local governments, is entirely irrelevant insofar as the assertion of federal right is concerned, and where the purpose and effect of those conditions, when applied in § 1983 actions, is to control the expense associated with the very litigation Congress has authorized.

Id. at 2309-10 (citation omitted) (emphasis added).

Moreover, this is not a context in which the Court need or should search for a "clear statement" from Congress before insisting that Florida exercise its jurisdiction over petitioner's § 1983 claim. The "clear statement" rule was developed by this Court in Eleventh Amendment cases. *See Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 242 (1985). It is not the test that this Court has used in allocating jurisdiction between the federal and state

courts,[31] or in deciding which attributes of a federal cause of action apply in state court.[32] Nor does this case present the sort of legal issue that "alter[s] the 'usual constitutional balance between the States and the Federal Government.'" *Will*, 109 S.Ct. at 2308 (citation omitted). The Court resolved in *Monell* that local governments are amenable to suit under § 1983. Given that holding, respondents' jurisdictional objection to enforcing *Monell* in the state courts must now be assessed in terms of its compatibility with the remedial purposes of § 1983. The decision below never even considered those purposes and thus discounted entirely the federal interest in uniform application of § 1983. It is not surprising that this distorted calculus led the court below to the erroneous conclusion that each state is free, as a matter of state law, to determine whether local governments are protected by sovereign immunity from a § 1983 action in the state courts.

Finally, the decision below overlooks the important policy reasons supporting state jurisdiction over § 1983 claims. In part, those reasons are related to caseload. Without an available state forum, civil rights plaintiffs "would have no choice but to bring their complaints concerning state actions to federal courts." *Maine* v. *Thiboutot*, 448 U.S. at 11 n.12.[33] But, far more impor-

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[31] *See Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981) (federal courts do not have exclusive jurisdiction over personal injury actions arising under the Outer Continental Shelf Lands Act).

[32] *See Dice* v. *Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952) (jury's factfinding role in FELA action brought in state court is governed by federal law).

[33] Although there are no precise statistics, most commentators agree that the number of state court § 1983 actions has increased dramatically in recent years. *See* Steinglass, "The Emerging State Court § 1983 Action: A Procedural Review," 38 Miami L.Rev. 381 (1984).

tantly, state court § 1983 actions offer one way to ensure that the enforcement of federal constitutional rights will be seen, and acted upon, as a shared responsibility of the states and national government. For civil rights plaintiffs, the benefits of that system of shared responsibility are perhaps obvious. However, it is equally beneficial for the states themselves since it provides a mechanism through which the constitutional misdeeds of local officials can be corrected without the intervention of the federal courts. In so doing, § 1983 furthers the broadest principles of federalism that would be seriously disserved if states could effectively opt out of any meaningful role in constitutional review.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed and remanded for further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI of the United States Constitution provides, in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Fla. Stat. § 768.28 provides, in relevant part:

> (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations in this act. Any such action may be brought in the county where the

property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

(2) As used in this act, "state agencies or subdivisions" include the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.

* * * *

(5) The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages or interest for the period before judgment. Neither the state nor its agencies or subdivisions shall be liable to pay a claim or a judgment by any one person which exceeds the sum of $100,000 or any claim or judgment, or portions thereof, which, when totaled with all other claims or judgments paid by the state or its agencies or subdivisions arising out of the same incident or occurrence, exceeds the sum of $200,000. However, a judgment or judgments may be claimed and rendered in excess of these amounts and may be settled and paid pursuant to this act up to $100,000 or $200,000, as the case may be; and that portion of the judgment that exceeds these amounts may be reported to the Legislature, but may be paid in part or in whole only by further act of the Legislature. Notwithstanding the limited waiver of sovereign immunity provided herein, the state or an agency or subdivision thereof may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action by the Legislature, but the state or agency or subdivision thereof shall not be deemed to have waived any defense of sovereign immunity or to increased the limits of its liability as a result of its obtaining insurance coverage for tortious acts in excess of the $100,000 or $200,000 waiver provided above. The limitations of liability set forth in this subsection shall apply to the state and its agencies and subdivisions

whether or not the state or its agencies or subdivisions possessed sovereign immunity before July 1, 1974.

* * * * *

(9)(a) No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. However, such officer, employee, or agent shall be considered an adverse witness in a tort action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of his employment or function. The exclusive remedy for injury or damage suffered as a result of an act, event, or omission of an officer, employee, or agent of the state or any of its subdivisions or constitutional officers shall be by action against the governmental entity, or the head of such entity in his official capacity, or the constitutional officer of which the officer, employee, or agent is an employee, unless such act or omission was committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting outside the course and scope of his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

* * * * *

(16) No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in

federal court. This subsection shall not be construed to mean that the state has at any time previously waived, by implication, its immunity, or that of any of its agencies, from suit in federal court through any statute in existence prior to June 24, 1984.

(6)

FILED

FEB 6

No. 69-5363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

MARK HOWLETT, ETC.,

Petitioner,

VS.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT, and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,

Respondents.

On Writ of Certiorari To The District Court of Appeal Of Florida For The Second District

RESPONDENT'S BRIEF

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PETITION FOR CERTIORARI FILED
AUGUST 15, 1969
CERTIORARI GRANTED NOVEMBER 13, 1969

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a local School Board, is, by virtue of the sovereign immunity of the state, immune from suit in an action brought in state court, based on 42 U.S.C. Section 1983.

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STATEMENT OF THE CASE

The primary issue before this Court does not require this Court to address the merits of Petitioner's allegations against the School Board of Pinellas County, Florida. Therefore, little time will be devoted here to disputing the recitation of events set forth in Petitioner's Brief. The Circuit Court of Pinellas County, Florida has already determined, in a related proceeding, that the "search" of Petitioner's vehicle was lawful (JA18). Furthermore, Petitioner's complaint describes Petit's actions as trying to unblock the exit to a parking lot (JA5). This conduct was reasonable under the circumstances alleged. Petitioner's own complaint (JA10 & JA11) also sets forth allegations that he was notified of the nature and the basis of the accusations against him, and that he was given a chance to explain the circumstances to Mr. Petit. Thus, the procedural due process requirements established by this Court for student suspension cases were adhered to by Respondents. It is also submitted that the language of the *Code of Student Conduct* in use in Pinellas County Schools is sufficiently clear in its use of the term "alcoholic beverage" to provide substantive due process.

Following the denial by the trial court of Petitioner's Motion for Re-Hearing of the Court's Order Granting Respondents' Motion to Dismiss, a Notice of Appeal was filed. It is important to note that only three issues were presented to the appellate court:

"I. Whether the question of a state and its subdivisions' sovereign immunity to an action brought in a state court under the Federal Civil Rights Act of 1871, 42 U.S.C. §1983, is a question of state or federal law?

II. Whether under Federal Law a Florida School Board is immune from suit under §1983?

III. Whether it is necessary to exhaust State remedies under the Florida Administrative Procedure Act before bringing an action for damages in a Florida Court under §1983?"

At no point was the issue whether the individually named Defendants (Rose, Gray, and Petit) were improperly dismissed from the action presented to the State Appellate Court.

Basing its decision on the first two issues, the Appellate

Court upheld the Trial Courts' decision, and did not render an opinion on the issue of exhaustion of administrative remedies. The Supreme Court of Florida declined to review the case, and this petition followed.

SUMMARY OF ARGUMENT

This Court should not address the issue whether the complaint filed against the individually named Defendants, Scott N. Rose, William Gray and Thomas Petit, was properly dismissed. The issue of the propriety of that dismissal was not presented to the Second District Court of Appeal for the State of Florida, and it would therefore be manifestly unfair both to those individuals, and to the courts of the State of Florida for this Court to decide that issue.

Common law immunities and defenses to actions based on 42 U.S.C. §1983 have long been recognized by this Court, as long as they were well established at the time Congress enacted what is now codified as 42 U.S.C. §1983. The defense of sovereign immunity is such a defense. It was well established by 1870, and there is no evidence that Congress intended to abrogate it by its passage of 42 U.S.C. §1983.

Common law sovereign immunity was not created by §768.28 of the Florida Statutes. Instead, that statutory provision waives sovereign immunity to a limited extent. Therefore, that statute is not inconsistent with federal legislation. Moreover if §768.28 is invalid, the defense of common law sovereign immunity would not be diminished, since the effect of the statute's invalidity would be that the State of Florida had not waived sovereign immunity at all. Under Florida law, state courts lack jurisdiction to entertain actions against the state or its subdivisions, unless there has been a waiver of sovereign immunity.

For purposes of sovereign immunity, a school district in the State of Florida should be considered a part of the state government. School districts were organized to aid the state in public education. The State of Florida by statute and by regulation tightly controls the exercise of power by local

school boards. School boards or school districts in the State of Florida have long been considered an integral part of state government, especially for sovereign immunity purposes. Virtually every state in the union has also regarded school districts, for sovereign immunity purposes, as part of the state government. Therefore, this court should recognize that the defense of sovereign immunity exists for local school districts, at least in the State of Florida, for actions based on 42 U.S.C. §1983.

In any event, the judgment of the Second District of Appeal of the State of Florida should be affirmed, because ample alternative grounds, raised in the trial court, exist for dismissing Petitioner's Complaint.

ARGUMENT

I

THE QUESTION OF THE CORRECTNESS OF THE TRIAL COURT'S DISMISSAL OF THE PETITIONER'S COMPLAINT AGAINST THE INDIVIDUAL DEFENDANTS IS NOT FAIRLY OR PROPERLY BEFORE THIS COURT.

This Court's jurisdiction is founded on the fact that another court has rendered a decision, in this case the Florida Second District Court of Appeal, Sup. Ct. Rule 10. It is obvious from the record that for whatever reason, Petitioner chose not to present to that court the question of whether the complaint against Rose, Gray and Petit should have been dismissed. Petitioner is now foreclosed from raising this issue. It is submitted that it is unfair to the Second District Court of Appeal to accuse that Court of not rendering a clear decision on the issue of the individual's protection (if any) under the theory of sovereign immunity, because that court was never asked to render a decision on that subject.

This Court traditionally declines to rule on questions first presented here. In *Ellis v. Dixon*, 349 U.S. 458 (1955) a

petitioner attempted to raise the issue of the alleged vagueness of a local school board's rules on the use of school facilities for non-scholastic purposes for the first time. This Court stated that "The question of whether the regulations are unconstitutionally vague was not raised below, and hence is not open here", p. 460.

Even if the Trial Court erred in granting the Motion to Dismiss as to the individually named defendants, for the reasons set forth, (JA19), that issue was waived by Petitioner by failing to present that question on appeal. This Court should not indicate that the Second District Court of Appeal of the State of Florida committed an error by failing to rule correctly on an issue not presented to it. The focus of this Court's deliberation should be whether the Trial Court erred in dismissing the complaint against the School Board of Pinellas County, and the remainder of this Brief will be devoted to that, the only issue fairly before this Court.

II.

THE COMMON LAW DOCTRINE OF SOVEREIGN IMMUNITY APPLIES TO ACTIONS BROUGHT AGAINST STATES, IN THE COURTS OF THAT STATE, PURSUANT TO 42 U.S.C. §1983.

It is apparent from the authorities relied on by Petitioner, that a number of different types of immunities have become confused with each other. It is therefore necessary to discuss briefly what issues do *not* support petitioner in this case.

First, petitioner cites cases dealing with immunity given to states by the 11th Amendment of the Constitution of the United States, and especially relies on *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), which held that local school districts in Ohio are not protected by the 11th Amendment. The plain language of that Amendment indicates that it applies only to "the judicial power of the United States", and therefore the decision in *Mt. Healthy* does not compel or even suggest the outcome here. *Will v.*

Michigan Department of State Police, ____ U.S. ____, 109 S. Ct. 2304 (1989). In any event, the 11th Amendment was not even asserted as a basis for dismissing the Complaint filed in the Trial Court (JA13-18).

Also, this Case does not deal with a state statutory grant of immunity or of statutory procedural requirements that potentially have the effect of granting immunity. Thus, two recent opinions of this Court, heavily relied on by Petitioner, must be distinguished.

The first of those, *Martinez v. California*, 444 U.S. 277 (1980) involved an action initiated in State Court. The immunity discussed in *Martinez*, however was different from the traditional concept of sovereign immunity. A careful reading of *Martinez* reveals that a statute, §845.8a of the Cal. Gov't. Code Ann. (West Supp. 1979) *created* immunity for a certain type of activity. Indeed, apparently all governmental immunity in the State of California is *created* by statute. The Courts of that state abolished the doctrine of sovereign immunity, and the state legislature passed a Tort Claims Act to recreate the defense, *Ramirez v. City of Redondo Beach*, 185 Cal. App. 3d 903, 229 Cal. Rptr. 917 (App. 2nd Dist., 1986), vacated on other grounds at 732 P. 2d 179, 234 Cal. Rpt. 515 (1987). Thus, the immunity discussed in *Martinez* is derived, not from the long established judicial doctrine of sovereign immunity, but solely from an enactment of the California legislature. Quite correctly, this Court ruled that legislative enactments in conflict with federal law could not be enforced. However, since §768.28 of the Florida Statutes does not *create* the immunity asserted as a defense in the instant case, the opinion in *Martinez* provides little, if any, guidance in resolving the issue at bar.

Similarly, the opinion of this court in *Felder v. Casey*, 487 U.S. 131 (1988) is not on point. That opinion discussed the enforcement of procedural requirements in an action against individuals, not against any governmental entity. As set forth earlier, the question of whether or not individuals are protected from §1983 actions by the doctrine of sovereign

immunity is not fairly before this Court, since that question was not preserved in the appeal to the Second District Court of Appeal in Florida. A reading of the state court opinion in *Felder v. Casey,* 408 N.W. 2d 19 (Wis. 1987) reveals that sovereign immunity, as distinct from a statutory grant of immunity, was not an issue. Almost certainly this is due to the fact that individuals employed by the sovereign did not traditionally enjoy the sovereign's immunity. (See for example, the discussion of the extent of sovereign immunity found in this Court's opinion of *Cunningham v. Macon and Brunswick R.R. Co.,* 109 U.S. 446, 452 (1883). This position is further confirmed by a reading of Wisc. Stat. §893.80. It is clear that the procedural requirements struck down by the Court were *created by statute,* not founded on long-established legal principles. Therefore, like *Martinez, Felder* does not compel the answer to the question raised in this case.

Petitioner seems to take the position that because this Court has not regarded statutory grants of immunity as a defense to actions based on 42 U.S.C. §1983, then no immunity, of any nature, exists to such litigation. Such a position is untenable, and in direct conflict with the previous opinions of this Court.

In *Tenney v. Brandhove,* 341 U.S. 367 (1951), this Court addressed the question of whether or not the immunity traditionally enjoyed by legislators for legislative acts was intended to be abrogated by the United States Congress in passing what is now codified as 42 U.S.C. §1983. This Court acknowledged that there was no evidence on which to base such a finding, thus recognizing that some immunity existed from §1983 actions.

In *Pierson v. Ray.* 386 U.S. 547 (1967), this Court recognized that judges, acting in their judicial capacity, enjoyed the protection of a similar, long established immunity. "The legislative record gives no clear indication that Congress intended to abolish *wholesale* all common law immunities. Accordingly this Court held in *Tenney v. Brandhove,* (Citation omitted) that the immunity of legislators for acts within

the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we may presume that Congress would have specifically so provided had it wished to abolish the Doctrine," Id. at 554 (emphasis added). Thus, any immunity established at common law, prior to the Civil Rights legislation of the 1870's, is still a defense against a 42 U.S.C. §1983 claim. *Owen v. City of Independence,* 445 U.S. 622, 638 (1980). In *Will v. Michigan Department of State Police,* _____ U.S. _____, 109 S. Ct. 2304 (1989), this Court held that states were not persons within the normal meaning of the word, and any interpretation of §1983 to the contrary would have to be supported by a clear expression of Congressional intent. The same logic applies here, had Congress intended there to be no defense of sovereign immunity, there would have been a clear expression of intent to abolish that defense.

The Doctrine of Sovereign Immunity is such a well established common law immunity as to fall in the category of immunities that currently exist against 42 U.S.C. §1983 claims. Even a cursory check of the former opinions of this Court reveals that the doctrine is indeed one of long standing. For example in *Cunningham v. The Macon & Brunswick R.R. Co.,* 109 U.S. 446 (1883) the Court held "It may be accepted as a point of departure *unquestioned,* that neither a state nor the United States can be sued in any Court in this country without their consent" (emphasis added).

More recently in *Nevada v. Hall,* 440 U.S. 410 (1979), the history of sovereign immunity and its legal basis were discussed at length. Based on the facts recited in that discussion, it is submitted that few, if any, common law immunities were better established by the 1870's than the Doctrine of Sovereign Immunity.

Petitioner also implies that even if sovereign immunity is a defense to claims for damages, then surely equitable or injunctive relief could still be sought without contending with sovereign immunity as a defense. In *Cunningham,* e.g., the Court, as has already been indicated, detailed the exceptions

to the defense of sovereign immunity that existed in the 19th century. An exception for equitable actions against the sovereign itself does not appear. Furthermore, in affirming the trial court's dismissal of this case Florida District Court of Appeal has obviously determined that common law sovereign immunity has not been waived, even as to actions seeking equitable or injunctive relief. This aspect of common law sovereign immunity is not an invention of the State of Florida. For example in the Case of *Mathewson v. New York State Thruway Authority,* 11 A.D. 2d 782, 204 N.Y.S. 2d 904 (1960), the Supreme Court of New York held that under the doctrine of sovereign immunity an equitable action could not be brought against a government agency itself.

Thus, it is clear that sovereign immunity exists as a defense to any action brought against a state in the state's own courts pursuant to 42 U.S.C. §1983, *Will v. Michigan Department of State Police,* _____ U.S. _____, 109 S. Ct. 2304 (1989). Moreover, because state courts in Florida lack jurisdiction to entertain claims against the state or its political subdivisions, the existance of sovereign immunity means that those courts have no authority, absent a waivor, to adjudicate Section 1983 claims against entities that are protected by sovereign immunity. See Brief of the National Association of Counties, et al, as *amici curiae* in support of Respondents.

III.

SECTION 768.28, OF THE FLORIDA STATUTES IS NOT INVALID AS CONFLICTING WITH FEDERAL LAW.

Petitioner has somewhat shifted his fire from the concept of sovereign immunity to Florida §768.28 itself. It must be stressed once again that respondent is asserting common law sovereign immunity as a defense in this Case. Respondent does not contend that §768.28 granted any immunity to the State of Florida that did not exist at common law. Rather, §768.28 waived that immunity to a limited extent. It cannot seriously be contested that the waiver so far as it goes does *not* include actions based on 42 U.S.C. §1983. *Hill v. Department of Corrections,* 513 So. 2d 129 (Fla. 1987).[1]

It must also be mentioned that the validity of §768.28 Fla. Stat. was not raised before the state courts, and therefore any question as to its validity is not fairly before this Court (See discussion in "I" Supra). However, some time will be spent in addressing the questions raised on this point by the Petitioner. If Petitioner's position is carried to its logical conclusion, a finding would result that would require states that enacted legislation waiving sovereign immunity to any extent to also pass legislation waiving sovereign immunity to actions or claims based on 42 U.S.C. §1983. Such a ruling should only be based on the clearest expression of congressional intent, and absolutely no such expression of intent has been placed before this Court.

Let us assume, however, for the of the discussion, that §768.28 is invalid because it conflicts with Federal Law. That assumed invalidity would have no effect on this Case. If the Florida Legislature had never passed the law codified as §768.28 Florida Statutes, the argument in this Case would still be whether or not common law sovereign immunity offers any protection against claims based on 42 U.S.C. §1983. If this Court should find that §768.28 was for some reason invalid, that statute would become a nullity. Thus, there would be no waiver of sovereign immunity in the State of Florida. Such an action would not create a greater waiver of sovereign immunity than currently exists.

Finally, on this point, Petitioner cites a number of cases

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[1]Petitioner cites several Florida cases as being in conflict with this statement, but each fails to discuss the issue of sovereign immunity. In particular, Petitioner refers to the case of *Franklin County School Board v. Page,* 540 So. 2d 891 (1st D.C.A. 1989), "(holding that local government units do not enjoy a sovereign immunity from §1983 suits in State Courts)". A reading of that opinion reveals, once again, that sovereign immunity was not addressed by that court. Moreover, had such a concfict existed in the State Court opinion, the State Supreme Court could have accepted jurisdiction to resolve that conflict. Fla. Const. Article V §3(6)(4).

in which States, through their courts or otherwise, simply refused to enforce Federal legislation. However, this is not such a case. Thus, the courts of the State of Florida are not refusing to hear an action simply because that action is based on Federal Law, as in *McKnett v. St. Louis and S.F. Ry Co.,* 292 U.S. 230 (1934), they have simply recognized that a defense to such actions exists in the form of sovereign immunity. The state court decision criticized in *McKnett* was far broader in scope than the state appellate decision in this case. Indeed, as petitioner concedes, this court has never held that a state must allow §1983 actions to be heard in its courts. Therefore, there certainly is no reason to not only require such actions to be heard, but to also take the step of abolishing long-established immunities and defenses that exist as to particular defendants in state court.

For further discussion of Fla. Stat. §768.28, see Brief of the National Association of Counties, *et al,* as *amici curiae* in support of Respondents.

IV.

A LOCAL SCHOOL BOARD OF THE STATE OF FLORIDA IS CONSIDERED PART OF THE STATE GOVERNMENT FOR PURPOSES OF COMMON LAW SOVEREIGN IMMUNITY FROM LITIGATION BASED ON 42 U.S.C. §1983.

Having established that common law sovereign immunity does provide protection against 42 U.S.C. §1983 actions, the sole remaining question is whether or not a school board in the State of Florida enjoys the benefit of that protection.

Respondent is not unmindful that this court has held that school districts in the State of Ohio enjoyed no protection from the 11th Amendment, *Mt. Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1979), that a city enjoys no special immunity from §1983 suits, *Owen v. City of Independence,* 445 U.S. 622 (1980), and that school districts in many states are "persons" within the meaning of Section 1983, *Monell v. Department of Social Services of City of New York,* 436 U.S.

658 (1978). Notwithstanding those decisions, there is ample authority to support Respondent's position that, for sovereign immunity purposes, a school board in the State of Florida should be treated as a branch of state government and given the protection of that doctrine.

In the first place, school districts were created by the legislature in Florida in 1848. Thus, they are not, and were not, groups of citizens organizing themselves into a corporation, thereby accepting the liabilities of such an organization together with its benefits. The legislation creating school districts in Florida has been filed under separate cover with the Clerk of this Court, with a copy being provided to opposing counsel. From this legislation, it can be seen that the *state* controlled such mundane aspects of school operation as the method of keeping attendance records (Laws of Florida, 1848, Ch. 230 §32, Pg. 34). Such control exists in current statutes as well. This control ranges from trivial matters (see for example §230.222 Fla. Stat. which disregards local preference and reads "The School Board shall not take action to prohibit school bands from playing the song commonly known as 'Dixie', nor shall it take action to prohibit the playing of 'Dixie' at school functions by non-school bands", to matters of curriculum and purchasing. For example, purchasing of goods must comply with regulations established by the Department of General Services, §230.23 (10)(j) Fla. Stat. Curriculum is tightly controlled as well, for example by §230.2319 Fla. Stat. which sets forth, inter-alia, course requirements for grades 4-8. Also, §239.053 Fla. Stat. establishes the State Board of Education as the "chief policy making and coordinating body of Public Education in Florida". Based on that statute, the Department of Education has issued a number of regulations further controlling every aspect of school operations. Even the grounds for which a tenured teacher may be discharged from employment by a local school board are defined by state regulation, §6B-4.009 Fla. Adm. Code. The regulations promulgated by the Department of Education for the State of Florida have also been supplied to the Clerk of this Court, with a copy being fur-

nished to opposing counsel. The extent of state control of school districts in Florida is a factor to consider in deciding whether a school district is part of the state for sovereign immunity purposes.

In *Mt. Healthy* this court has previously expressed an intent to look on the ability to levy taxes and issue bonds as important criteria in determining whether or not a local school district should be considered part of the state for 11th Amendment purposes. If that ability is also considered for sovereign immunity purposes, local school boards in Florida should still be considered part of the state, notwithstanding the fact that school boards do have some power to issue bonds and to levy taxes. In the first place, the school board's power to levy taxes and to issue bonds is, like so much of education in Florida, given and controlled by a state statute, chapter 236 Florida Statutes. Secondly, entities unquestionably part of state government have the power to issue bonds and to levy taxes. For example, see chapter 373 Fla Stat., creating water management districts, and particularly §373.503, authorizing the levy of taxes and §373.563, authorizing the issuance of bonds by those districts. Thus, this ability should not be determinitive of the question.

Florida, apparently unlike the State of Ohio, has repeatedly held that school districts are an integral part of state government, *State ex. rel. Allen v. Board of Public Instruction of Broward County*, 214 So. 2d 7 (Fla. 4th Dist. Ct. App. 1968). This has been, and is, true especially in cases involving the question of sovereign immunity. *Buck v. McLean*, 115 So. 2d 764 (Fla. 1st Dist. Ct. App. 1959) and *Bragg v. Board of Public Instruction of Duvall County*, 36 So. 2d 222 (Fla. 1948). Significantly, in both *Buck* and *Bragg*, the courts of the State of Florida recognized the distinction between school districts which do enjoy the protection of common law sovereign immunity and cities, which, as this court found in *Owen*, do not.

Florida is not the only state that has long held school districts to be part of state government. Some federal courts,

even since *Mt. Healthy*, have held that where a school district is considered part of the state, even 11th Amendment protection is available. See *Garcia v. Board of Education*, 777 F. 2d 1403 (10th Cca 1985), cert. denied 179 U.S. 814 (1986). In *Lane s. District Township of Woodbury*, 58 Iowa 462, 12 N.W. 478 (1882) it was held that the sole purpose of school districts is to facilitate the *state's* (emphasis added) providing education for its citizens, and that, therefore, sovereign immunity was applicable to an action in tort brought against the township. Many other states have held that for sovereign immunity purposes a school district, or its equivalent, is a branch of state government, *Bank v. Brainerd School District*, 49 Minn. 106, 51 N.W. 814 (1892); *Ford v. School District of Kendall Borough*, 121 Pa. 543, 15 A 812 (1888), vacated when Pennsylvania waived sovereign immunity, *Ayala v. Philadelphia Board of Public Instruction*, 453 Pa. 584, 304 A 2d 877 (1973); and *Lane v. District Township of Woodbury*, 58 Iowa 462, 12 NW 478 (1882).

Litigation against school districts was not as common in days of yore as it is today. However, there are even cases prior to the enactment of the law now codified as 42 U.S.C. §1983 (1871) that acknowledge that school districts are immune from suit. In *Granger and wife v. Pulaski County*, 26 Ark. 37 (1870) a suit was filed against a county for the negligent construction and maintenance of a bridge. The Arkansas court held that the county was a branch of state government and therefore immune to suit. The court mentioned, albeit in dicta, that a school district would enjoy the same sort of protection.

In *Bigelow v. Inhabitants of Randolf*, 80 Mass. 541 (14 Gray), (1860) suit was filed against a township which had undertaken the duties of operating a public school, for allegedly being negligent in the maintenance of the school property. Recognizing that there are some instances in which a township may be liable, the court stated "nor can this action be maintained for the town's neglect of its corporate duty concerning the keeping of schools and the providing of school houses — a duty imposed for public purposes exclusively, and

without its corporate consent — because no statute gives a private action against a town for an injury caused by neglect or violation of the school laws except by St. 1845 C. 214, to a child who is unlawfully excluded from public school instruction," once again demonstrating that school functions enjoy the protection of sovereign immunity.

These two very old cases demonstrate that even at the time Congress passed the law now codified as 42 U.S.C. §1983, school districts were protected by sovereign immunity. This factor distinguishes school boards from cities, based on the logic in *Owen*. In short, the general rule appears to be that school districts are considered part of state government for sovereign immunity purposes, 9 ALR, 904 and 160 ALR 1 (cited with approval in *Bragg*, supra). Although *Mt. Healthy* entertained an action against an Ohio School Board, and *Monell* expressly found that school boards were "persons" for §1983 actions, and enjoyed no *absolute* immunity from such actions, *Monell* was limited to local government units that are *not* considered part of the state. For sovereign immunity purposes in Florida, school boards have always been viewed as part of the state. Also, the finding that sovereign immunity protects school boards from suit does not bar all litigation against such entities, since Federal Courts remain available. Thus, the Congressional intent that this Court found to be present in *Monell*, that school boards be subject to suit under Section 1983 is not frustrated.

There are reasons for such holdings that have been set forth in the opinions cited. As indicated earlier, one reason is that school districts were created by states to assist in the implementation of state wide education. Also school boards have only those powers given to them by the state. One opinion pointed out that a catastrophic injury could result in the closure of the schools if the district could be held liable in tort for that injury, thus frustrating the entire purpose for which the district was established, to wit the education of children.

None of these reasons is inconsistent with the purposes of 42 U.S.C. §1983, which was designed to protect citizens

against individuals acting under color of state laws. It is clear that in the 19th century, school districts, for sovereign immunity purposes were not considered individuals, but part of the state. It is submitted that the reasons for the holdings concerning sovereign immunity are no more incompatible with §1983's purposes than those asserted to support judicial and legislative immunity.

This court has, in the past, recognized that entities created by a sovereign may become imbued with that sovereign's immunity, *Keifer and Keifer v. R.F.C.*, 306 U.S. 381 (1939). In the case at bar, Respondent only asks that this Court recognize the clear intent of the various states to have the local school districts created by them to be imbued with the same sovereign immunity enjoyed by the states themselves, as that intent has been expressed by over a century of judicial precedent.

V

THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA IN THIS CASE SHOULD BE AFFIRMED BASED ON THE FAILURE OF THE COMPLAINT TO SET FORTH ANY FACTS ON WHICH RELIEF COULD BE GRANTED.

Even though the discussion of the issue before this court is concluded, it must be said that notwithstanding the merits of the earlier discussion, the judgment from which Petitioner seeks relief should be affirmed.

Petitioner's Complaint sets forth three separate areas of alleged violations by Respondent. The first is, that an employee of the Respondent, Thomas Petit unlawfully "searched" Petitioner's vehicle. However, under the facts as alleged in the Complaint, Petit was acting reasonably in trying to remove a vehicle that was blocking access to a parking lot. The mere fact that alternative courses of action were available, does not render Petit's actions unreasonable. While

not conceding that Petit "searched" Petitioner's car, his actions were reasonable (even, if they are to be considered a "search"), and hence, are lawful, *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The same court, although a different division that dismissed Petitioner's Complaint, found the "search" to be reasonable (JA18).

Next, Petitioner claims that the term "alcoholic beverage" as used in the *Code of Student Conduct* of the Pinellas County School Board was so vague as to deny Petitioner substantive due process. Without belaboring the point, the term "alcoholic beverage" is of sufficiently plain meaning to provide substantive due process. Codes of student conduct do not have to be written with the same precision as Penal Codes, and language far vaguer than that complained of in the instant case has been upheld in the courts. See, for example, *Murray v. West Baton Rouge Parrish School Board*, 472 F. 2d 438 (5th c.r. 1973) and *Pervis v. LaMarque Independent School District*, 446 F. 2d 1054 (5th c.r. 1972).

Lastly, Petitioner complains of being denied procedural due process. However, this Court has held that procedural due process, in cases involving student suspensions of fewer than 10 days requires only that the student be given notice of the allegations, the basis for believing the student guilty, and an opportunity for the student to give his or her explanation of the events, *Goss v. Lopez*, 419 U.S. 565 (1975). From paragraph 33 of the Complaint (JA10 and JA11) it is obvious that this procedural due process was followed, and that Petitioner is only alleging that Mr. Petit declined to conduct further investigation after hearing Petitioner's version. Hence, Petitioner's procedural due process rights were not violated.

It is submitted that notwithstanding the decision this Court makes on the issue presented to it, the judgment appealed from should be affirmed, since ample alternative grounds exist to support the Trial Court's finding.

CONCLUSION

The judgment of the Second District Court of Appeal of Florida should be affirmed.

Respectfully submitted,

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February 8, 1990

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CLERK

No. 89-5383

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and friend,

Petitioner,

v.

SCOTT ROSE, as Superintendent of Schools for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT, and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,

Respondents.

On Writ Of *Certiorari* To The District Court Of Appeal Of Florida Second District

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Petitioner submits this brief in response to the arguments advanced by respondents and their supporting *amici*.[1] As discussed more fully below, those arguments largely ignore petitioner's principal contention that the State of Florida may not open its courts to § 1983 actions and then deny full relief to civil rights plaintiffs by recognizing defenses that would not be accepted if the identical action were brought in federal court. Instead, respondents attempt to recast the case in apocalyptic terms that are not suited to this record.

Despite respondents' urging, there is no need to decide whether state courts must accept jurisdiction over § 1983 claims in the face of an "otherwise valid excuse" for two very simple reasons. First, unlike the cases cited by respondents, Florida has not closed its courts to § 1983 claims; rather, it has attempted to shape and limit the § 1983 claims it is otherwise willing to hear. Second, Florida has not presented a "valid excuse" for its half-loaf treatment of § 1983 claims. To the contrary, Florida's sovereign immunity doctrine, as articulated by the Florida Supreme Court, either represents a discrimination against federal claims or a policy disagreement with the drafters of § 1983 over the scope of official liability for constitutional violations. Under the former view, Florida's position is inconsistent with *Testa* v. *Katt*, 330 U.S. 386 (1947). Under the latter view, it is inconsistent with *Mondou* v. *New York, N.H. & H. R.R.*, 223 U.S. 1 (1912). In either event, it cannot be sustained.

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[1] Unless otherwise indicated, the term "respondents" will be used throughout this brief to refer to respondents' *amici*, as well. When separate references are appropriate, citations to respondents' own brief will be preceded by the notation "RB"; citations to the *amicus* brief submitted on behalf of the National Association of Counties, *et al.*, will be preceded by the notation "NAC"; citations to the *amicus* brief submitted on behalf of the Washington Legal Foundation, *et al.*, will be preceded by the notation "WLF."

Respondents' claim that the county school board in this case can be described as an "arm of the state" and thus outside the reach of § 1983, *see Will* v. *Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989), is based on a similarly misguided sense of the relationship between state and federal law in interpreting § 1983. If adopted, it would lead to protracted litigation (in state and federal courts) that is both unnecessary and unwise.

ARGUMENT

I. HAVING OPENED ITS DOORS TO § 1983 CLAIMS, FLORIDA CANNOT IMPOSE BARRIERS TO FULL RELIEF THAT ARE INCOMPATIBLE WITH THE REMEDIAL DESIGN OF THE FEDERAL STATUTE

None of the briefs submitted in this case seriously dispute the proposition that Florida courts can and do routinely hear § 1983 actions against individual defendants.[2] Thus, this is not a case in which Florida has closed its doors to § 1983 claims, or in which this Court is being asked to pry those doors open. Rather, this is a case in which Florida has superimposed a state-created barrier to full relief on § 1983 claims that it is otherwise willing to hear. It is precisely that effort that this Court rejected in *Martinez* v. *California*, 444 U.S. 277 (1980), and *Felder* v. *Casey*, 108 S.Ct. 2302 (1988).

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[2] A partial list of relevant cases is collected in petitioner's opening brief. PB at 19 & n.21. Citing some of the same decisions, respondents' *amici* declare it "clear that Florida courts will entertain Section 1983 actions against individuals . . . ." NAC at 8 (footnote omitted). Respondents themselves do not take any position on the issue; on the other hand, they do not present any contrary authority. RB at 3-4. Nor do respondents dispute that some appellate courts in Florida have continued to entertain § 1983 suits against local governmental units in plain disagreement with the decision below. PB at 18 n.19.

The distinction is fundamental and should not be obscured in a semantic debate over jurisdictional objections versus immunity defenses.[3] It is one thing for a state to decline to hear § 1983 cases at all. It is quite another thing for a state, like Florida, to entertain § 1983 claims and then attempt to shape the contours of the federal cause of action. As the Court recognized in *Martinez* and *Felder*, the Supremacy Clause was designed to ensure a uniform interpretation of federal law regardless of forum. That goal would be thwarted if respondents prevail.

What respondents seek is nothing less than the right to enforce § 1983 in piecemeal fashion based on state law concerns. The jurisprudence of this Court does not permit that result. *See Maine* v. *Thiboutot*, 448 U.S. 1, 11 (1980) (attorney's fees are "part of the § 1983 remedy whether the action is brought in state or federal court"). At a minimum, the Supremacy Clause requires the state courts "to proceed in such a manner that all the substantial rights of the parties under controlling federal law [are] protected." *Garrett* v. *Moore-McCormack*, 317 U.S. 239, 245 (1942).[4] That standard is not met so long as the Florida courts only permit constitutional claims to be asserted against individual defendants.

Finally, the fact that the Florida courts are willing to entertain § 1983 suits against individual defendants dis-

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[3] *See* NAC at 7. Under Florida law, the circuit courts have general jurisdiction over "*all* actions at law not cognizable by the county courts." Fla.Stat. § 26.012(2) (a) (emphasis added).

[4] The Supremacy Clause, of course, binds state judges as well as state and local political officials. Indeed, the Supremacy Clause expressly provides that "the judges in every state shall be bound by [the Constitution and laws of the United States], anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const., Art. VI.

tinguishes this case from the FELA decisions relied on by respondents. Each of those cases involved a neutral state rule that barred any and every aspect of plaintiff's federal claim, either because the statute of limitations had run[5] or on *forum non conveniens* grounds.[6] Here, what Florida has done is akin to accepting jurisdiction with reservations—namely, the right to insulate certain defendants from liability that would otherwise attach under § 1983. Nothing in the FELA cases supports that result.

II. RESPONDENTS HAVE FAILED TO ARTICULATE A "VALID EXCUSE" SUFFICIENT TO JUSTIFY THE DECISION BELOW, EVEN IF VIEWED IN JURISDICTIONAL TERMS

This Court has noted that states may decline jurisdiction over FELA claims if the decision to do so is based on an "otherwise valid excuse." *See* nn.5 & 6, *supra*. The Court has also noted, however, that an excuse will not be deemed "valid" if it discriminates against federal claims, *Testa* v. *Katt*, 330 U.S. 386 (1947), or reflects a substantive disagreement with federal policy, *Mondou* v. *N.H. & H. R.R.*, 223 U.S. 1 (1912). Florida's invocation of sovereign immunity in this case fails at least one, and perhaps both, of these tests.[7] For this reason as well, the FELA deci-

[5] *Herb* v. *Pitcairn*, 324 U.S. 117 (1945) (limitations period was not extended by plaintiff's improper filing in state court of limited jurisdiction rather than in court of general jurisdiction).

[6] *Douglas* v. *New York, N.H. H. R.R.*, 279 U.S. 377 (1929); *Missouri ex rel Southern Ry.* v. *Mayfield*, 340 U.S. 1 (1950).

[7] Contrary to the elaborate arguments submitted by respondents' *amici*, the court below never considered these federal questions because it deemed the issue of sovereign immunity purely a matter of state law. (Pet.App.2-3). As discussed at length in petitioner's opening brief, PB at 7-16, this fundamental misperception is enough to require reversal.

sions cited by respondents do not support the decision below.

A. Florida's Sovereign Immunity Rules, As Applied In This Case, Discriminate Against § 1983 Claims

Respondents devote a great deal of effort to establishing a purported disagreement among the parties regarding the proper interpretation of Florida's sovereign immunity law.[8] It is a false debate. Petitioner is quite prepared to accept respondents' contention that Florida has retained the concept of sovereign immunity for "discretionary" governmental acts.[9] But that premise does not support respondents' conclusion that Florida's extension of sovereign immunity to the sort of constitutional

[8] *See* NAC at 13-15.

[9] *Id.* at 14. It is worth noting, however, that Florida law is not quite as clear as respondents portray it. As one commentator has observed: "Obviously much confusion still exists regarding governmental tort liability in Florida." Comment, "The Florida Supreme Court's View of State Sovereign Immunity: An Exercise in Confusion Producing Restrictive Results," 15 Stet. L. Rev. 831, 850 (1986). In particular, the notion that Florida's generalized waiver of sovereign immunity does not extend to discretionary acts was most clearly articulated in *Trianon Park Condominium Association, Inc.* v. *City of Hialeah*, 468 So.2d 912 (Fla.1985), and eight other cases decided on the same day. None of those nine cases, however, was even cited in *Hill* v. *Dep't of Corrections*, 513 So.2d 129 (Fla.1987), *cert. denied*, 108 S.Ct. 1024 (1988), as support for its holding that sovereign immunity remains a continuing bar to § 1983 suits against state agencies in the Florida state courts.

Petitioners do not believe that the uncertainty in Florida law over the precise scope and rationale of the sovereign immunity defense should affect the outcome of this case. Should the Court disagree, however, the proper recourse would be to remand to the Florida courts for clarification. *Cf. Virginia* v. *American Booksellers Association, Inc.*, 108 S.Ct. 636 (1988).

claims embraced by § 1983 is the product of a neutral, nondiscriminatory rule. Indeed, the discrimination inherent in Florida's rule is highlighted by respondents' attempt to bring § 1983 within the "discretionary" act exception.

As this Court stated in *Owen* v. *City of Independence*, 445 U.S. 622, 649 (1980):

> [A]n understanding of the rationale underlying the common-law immunity for "discretionary" functions explains why that doctrine cannot serve as the foundation for a good-faith immunity under § 1983. That common-law doctrine merely prevented courts from substituting their judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.

It is not surprising, therefore, that the Florida cases cited by respondents have nothing to do with § 1983 and are all easily distinguishable on their facts.[10] For example, in *Carter* v. *City of Stuart*, 468 So.2d 955 (Fla.1985), plaintiff sued the city for its alleged failure to enforce an animal control ordinance after being bitten by a dog that had escaped from a private yard. In explaining why the case was dismissed on sovereign immunity grounds, the Florida Supreme Court wrote: "How and in what manner those laws are enforced is, in most instances, a judgmental decision of the executive branch." *Id.* at 957. In *Ursin* v. *Law Enforcement Ins. Co., Ltd.* 450 So.2d 1282 (2d DCA 1984), *approved*, 469 So.2d 1382 (Fla.1985), plaintiff sued the state for negligence after being kidnapped by an escaped convict who she alleged had been improperly assigned to a kitchen detail. The case was likewise dismissed on sovereign immunity grounds because the court concluded that the decision on "how and what manner" to classify prisoners was a discretionary one. Similarly, in *Conover* v. *Board of County Commissioners*, 527 So.2d 946 (3d DCA 1988), the court held that the decision on "how and what manner" to place a traffic signal at a particular intersection was shielded by sovereign immunity because it involved a discretionary planning judgment.[11]

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[10] *See* NAC at 14 nn.14 &15.

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[11] The other cases cited by respondents as evidence of a discretionary act exception to Florida's sovereign immunity waiver fit a similar pattern. None involved constitutional claims. *See Rosenberg* v. *Kriminger*, 469 So.2d 879 (3d DCA 1985) (suit against police for misrepresentation based on conduct of an official investigation); *Everton* v. *Willard*, 468 So.2d 936 (Fla.1985) (suit against police for failing to arrest drunk driver who was subsequently involved in a traffic accident); *Delgado* v. *City of Miami Beach*, 518 So.2d 968 (3d DCA 1988) (suit against city for injuries resulting from city's allegedly negligent failure to prevent private use of fireworks at a city concert); *Parker* v. *Murphy*, 510 So.2d 990 (1st DCA 1987) (suit charging prison officials with negligence for their assignment of an escaped convict to a work maintenance crew); *Palumbo* v. *Game & Fresh Water Comm.*, 487 So.2d 352 (1st DCA 1986) (suit against state officials for failing to erect a barrier that would have confined alligator to state park-grounds); *City of Delray Beach* v. *Watts*, 461 So.2d 142 (4th DCA 1984), *rev. denied*, 475 So.2d 696 (Fla.1985) (suit against city officials for siting of a garbage dumpster); *Dep't of Transportation* v. *Neilson*, 419 So.2d 1071 (Fla.1985) (suit alleging negligent failure to install adequate traffic control devices at a busy intersection); *Rumbough* v. *City of Tampa*, 403 So.2d 1139 (2d DCA 1981) (suit challenging

Here, petitioner has alleged that respondents violated his Fourth Amendment and due process rights. The obligation to obey those commands is not discretionary and cannot be compared with the decision on where to place a traffic signal or whether to allocate scare police resources to enforce an animal control ordinance. Conversely, respondents have not identified any Florida cases where sovereign immunity was invoked to defeat a tort claim based on a nondiscretionary duty other than in the § 1983 context. In short, respondents' detailed exploration of the discretionary act doctrine in Florida law does not refute the notion that § 1983 claims have been singled out for special and unfavorable treatment.[12]

B. Florida's Sovereign Immunity Rules, As Applied In This Case, Reflect A Substantive Disagreement With Federal Policy Embodied In § 1983

A second, possible interpretation of Florida's sovereign immunity law is that it shields even nondiscretionary acts

placement of city landfill); *Elliott* v. *City of Hollywood*, 399 So.2d 507 (4th DCA 1981) (suit charging city with failure to enforce municipal ordinance barring homeowners from growing bushes that obstruct motorist's view); *Payne* v. *Palm Beach County*, 395 So.2d 1267 (4th DCA 1981) (suit challenging county's failure to extend its road or build a guardrail); *Ellmer* v. *City of St. Petersburg*, 378 So.2d 825 (2d DCA 1979) (suit charging city with negligent failure to cordon off riot area).

[12] The discriminatory judgment inherent in Florida's treatment of § 1983 claims is perhaps most clearly expressed in the *amicus* brief of the Washington Legal Foundation, which argues that the decision below is justified because "§ 1983 causes of action are more likely to be frivolous than are other suits," WLF at 17, and thus the state courts are under no duty to entertain them. Petitioner does not accept this characterization of § 1983 suits. However, even in correct, it does not excuse state discrimination against federal law claims.

if they are deemed "governmental" in nature.[13] Petitioner believes that view misstates Florida law.[14] But whether or not Florida law includes a concept of "governmental" immunity that would extend to the facts of this case, it is clear that Congress made a different choice when it enacted § 1983. Florida is free to disagree with that choice. It is not free to undermine federal law by shielding local governments from liability for their constitutional wrongs.

As noted in petitioner's opening brief, PB at 9-11, the relationship of § 1983 to common law concepts of "governmental" immunity was fully explored by this Court in *Owen*. And, in *Owen*, the Court unequivocally rejected the argument that a broad-based concept of "governmental" immunity somehow survived passage of § 1983:

> [T]he municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of "persons" subject to liability for violations of the Federal Constitution and laws, Con-

[13] Respondents obliquely refer to this "governmental" immunity, NAC at 14, by noting that under state law Florida and its subdivisions are liable in tort "in the same manner and to the same extent as a private individual acting under like circumstances." Fla. Stat. § 768.28(5).

[14] The effort to discover a broad "governmental" immunity in Florida law is particularly ironic since Florida was one of the first states to repudiate the notion of "governmental" immunity as an absolute defense in tort actions. *See Hargrove* v. *Town of Cocoa Beach*, 96 So.2d 130 (Fla.1957). Moreover, in *Trianon Park Condominium Association, Inc.* v. *City of Hialeah*, 468 So.2d 912, 920 (Fla. 1985), the Florida Supreme Court was careful to stress that the surviving vestiges of "governmental" immunity are inextricably tied to the exercise of discretion.

> gress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed.

445 U.S. at 647-48 (footnote omitted).

Moreover, the theory of *Owen* clearly applies to state courts as well as federal courts, for reasons best stated by this Court more than 75 years ago:

> The suggestion that [an] act of Congress is not in harmony with the policy of the state, and therefore that the courts of the state are free to decline jurisdiction, is quite inadmissible, because it pre-supposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted [its] act, it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much a policy of [the state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.

Mondou, 223 U.S. at 57.

Put in the language of *Mondou*, any judgment by Florida that its local governmental bodies cannot be held liable for their constitutional wrongs is "quite inadmissible" because it represents nothing more than a substantive disagreement with the contrary judgment of the 42nd Congress that enacted § 1983.[15] Such disagreements do not represent a "valid excuse" for declining to hear federal law claims. *Id.* Nor is respondents' cause helped by FELA cases where the state's reliance on statute of limitations provisions or the doctrine of *forum non conveniens* was found to constitute a "valid excuse." *See* nn.5 & 6, *supra*. To the contrary, those cases merely establish that a "valid excuse" may be found where the state's jurisdictional choices are nondiscriminatory and do not conflict with federal law. The decision below satisfies neither prerequisite.

[15] Seventy years ago, Justice Holmes already deemed it "plain that a state cannot escape its constitutional obligations by the simple device of denying jurisdiction in such cases to courts otherwise competent." *Kenney* v. *Supreme Lodge*, U.S. 411, 415 (1920), *citing General Oil Co.* v. *Crain*, 209 U.S. 211 (1908).

III. THE QUESTION OF WHETHER CONGRESS IMPOSED MANDATORY STATE JURISDICTION OVER § 1983 CLAIMS NEED NOT BE REACHED IN THIS CASE

Respondents contend that the history of § 1983 does not support mandatory state jurisdiction over § 1983 claims.[16] That question, however, need not be reached in this case.[17] First, Florida has not closed its doors to § 1983 claims. *See* Point I, *supra*. Second, in the absence of a "valid excuse," the obligation to assume jurisdiction over federal claims is not derived from statute but from the Constitution itself. *McKnett* v. *St. Louis & S.F. Railway*, 292 U.S. 230, 233-34 (1934).[18] In particular, the principle of nondiscrimination has been recognized by this Court as an inescapable consequence of the Supremacy Clause. *Testa* v. *Katt*, 330 U.S. 386, 389 (1947).

In any event, respondents' historical argument against mandatory jurisdiction proves too much. If respondents are correct that § 1983 was intended to be an exclusive

[16] *See* NAC at 16-25.

[17] This Court has identified but not decided the question of mandatory jurisdiction in at least two other § 1983 cases. *See Maine* v. *Thiboutot*, 448 U.S. 1, 3 n.1 (1980); *Martinez* v. *California*, 444 U.S. 277, 283 n.7 (1980).

[18] *See also Burrell* v. *Mississippi State Tax Comm.*, 536 So.2d 848 (Miss.1988).

federal remedy, NAC at 21, then state courts would lack even concurrent jurisdiction over § 1983 claims. Yet, as respondents acknowledge, the appropriateness of concurrent jurisdiction is firmly established by this Court's decisions. NAC at 22. Moreover, respondents place too much emphasis on the language of the 1871 Act, which created § 1983 and provided for "such proceedings to be prosecuted in the several district or circuit courts of the United States."[19] Respondents stress the fact that this language does not mention state jurisdiction. However, it is at least equally significant that the drafters of § 1983 did not duplicate the language of the 1866 Civil Rights Act, a predecessor statute adopted only five years earlier, which had given jurisdiction to the federal courts "exclusively of the courts of the several states."[20]

Lacking statutory support for the claim that states should be free to accept, reject, or shape § 1983 actions however they choose, respondents fall back on the vague plea of federalism. It does not work in this case. First, § 1983 was adopted by a Congress that was openly distrustful of the former Confederate states. *See Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 506 (1982). At the very least, it is counterintuitive to suggest that Congress intended to grant those same states the right to limit the remedies available under § 1983 as they saw fit. Second, federalism is and must be a two-way street. Under certain circumstances it requires federal respect for state interests; under other circumstances it requires state respect for federal concerns. Given the unique historical circum-

[19] Civil Rights Act of 1871, ch. 22 § 1, 17 Stat. 13.

[20] Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27. *See generally*, Steinglass, *Section 1983 Litigation in State Courts* (1988), at § 9.2(b)(2).

stances that gave birth to § 1983, it is this latter meaning of federalism that should be given paramount value here. Third, the state interests at stake in this case are vastly overstated. There is no doubt that the Civil War Amendments and the statutes that implemented them, like § 1983, dramatically altered federal-state relations in this country. That fight, however, is long behind us. The question of where those rights can be enforced is, at best, a derivative issue. Finally, the interests of federalism are not advanced by rules of law that convert federal judges into the sole guarantors of constitutional behavior by state and local officials. To the contrary, that outcome undermines state sovereignty rather than promoting it. *See Smith* v. *Wade*, 461 U.S. 30, 92 (1983) (Rehnquist, J., dissenting).

IV. THERE IS NO NEED FOR FURTHER PROCEEDINGS TO DETERMINE THAT THE COUNTY SCHOOL BOARD IS A "PERSON" FOR § 1983 PURPOSES

It is undisputed that the county school board in this case is empowered by state law to issue bonds, Fla.Stat. § 236.37, and levy taxes, Fla.Stat. § 236.25.[21] Respondents nonetheless argue that the school board should be treated as an arm of the state and thus outside the reach of § 1983. *Cf. Will* v. *Michigan Dep't of State Police*, 109 S.Ct. 2304 (1989).[22] In a variation on that theme, respondents' *amici* argue that further proceedings are necessary to determine whether the school board can be properly characterized as a local governmental body for § 1983 purposes.[23] Neither contention has merit.

[21] *See* RB at 12; NAC at 28.

[22] *See* RB at 10-15.

[23] *See* NAC at 28.

Underlying both contentions is the erroneous implication that the school board's amenability to suit under § 1983 is a matter of state law. State law determines the duties bestowed on particular persons and agencies. *Cf. City of St. Louis* v. *Prapotnik*, 108 S.Ct. 915 (1988). But whether those duties are sufficient to impose liability under § 1983 is a matter of federal law. *See Will*, *supra*.[24]

In this case, the school board possesses the same key fiscal powers that this Court relied on in rejecting the school board's Eleventh Amendment defense in *Mt. Healthy City Board of Ed.* v. *Doyle*, 429 U.S. 274, 280-81 (1977). In addition, "local school boards [in Florida] have substantial responsibility for managing schools in their districts." NAC at 27. And while it is true that the school board in this case receives "some guidance" and "a significant amount of money" from the state, those factors were also present in *Mt. Healthy* and not deemed decisive. 429 U.S. at 280.

Under *Mt. Healthy*, the presence of independent funding powers and substantial managerial responsibilities is more than enough to bring the county school board within the scope of § 1983. When those factors are missing, it may be appropriate to conduct a more searching examination of the relevant state laws. Given their presence in this record, the Court should refrain from endorsing a procedure that would create yet another round of satellite litigation in § 1983 cases.

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[24] For that reason, the fact that a state chooses to describe a particular governmental body as a political subdivision of the state cannot be determinative. Otherwise, states could defeat a wide variety of § 1983 claims merely by *ipse dixit*.

CONCLUSION

For the reasons stated herein, and in petitioner's opening brief, the judgment below should be reversed.

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QUESTION PRESENTED

Whether a state court may, consistently with the Supremacy Clause of the U.S. Constitution, decline to accept jurisdiction over claims based on 42 U.S.C. § 1983.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

No. 89-5383

MARK HOWLETT,
Petitioner,

v.

SCOTT ROSE, *et al.*,
Respondents.

On Writ of Certiorari to
the District Court of Appeal of Florida
Second District

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, FLORIDA ASSOCIATION OF SCHOOL ADMINISTRATORS, AND PINELLAS INFORMED FAMILIES FOR DRUG FREE YOUTH AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the

administrative process in a variety of areas, WLF devotes a substantial amount of time to issues relating to the proper interrelationship between the national and state governments. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases involving intergovernmental relations. *See, e.g., Commonwealth of Pennsylvania v. Davenport*, No. 89-156 (decision pending 1990); *United States v. Spallone*, 58 U.S.L.W. 4103 (Jan. 10, 1990).

The Florida Association of School Administrators (FASA) is a voluntary organization based in Tallahassee, composed of over 4,100 superintendents, principals, deans, and other officials of the Florida public schools. FASA seeks to advance the cause of education in Florida and to strengthen the administrator's role as an educational leader. FASA is primarily concerned in this case with the potential of an explosion in the number of groundless suits being filed in the Florida state courts against school administrators conscientiously performing their complex and difficult duties.

The Pinellas Informed Families for Drug Free Youth is a coalition of parents, students, teachers, law enforcement officers, senior citizens, medical professionals, and other concerned citizens of Pinellas County, Florida. Pinellas Informed Families supports school officials in their fight against drug and alcohol abuse among their students and opposes the use of the courts as a tool of harassment against educators.

The principal issue raised in this case involves the extent to which Florida state courts may determine their own jurisdiction. *Amici* believe that within our federal system of government state courts ought to be permitted to control their own jurisdiction to the maximum extent that is consistent with the U.S. Constitution. *Amici*

believe that their interest in unfettered state court systems may not be fully shared by either of the parties, and the State of Florida (which presumably would share that interest) is not a party in this case. Since *amici*'s interest in the case may not be shared by the parties, *amici* believe that they can assist the Court by providing a perspective that is distinct from that of either party.

Amici submit this brief on behalf of Respondents with the written consent of both parties.

STATEMENT OF THE CASE

The trial court below dismissed Petitioner Mark Howlett's lawsuit on the basis of the pleadings. Accordingly, the allegations contained in Mr. Howlett's complaint should be accepted as true, to the extent they have any relevance to the matters at issue before this Court.

Mr. Howlett in 1986 was a student at St. Petersburg High School in Pinellas County, Florida. On October 9, 1986, Mr. Howlett and others parked their cars at school in such a manner that a food delivery truck was unable to exit from school grounds. The truck driver sought the assistance of Thomas Petit, an assistant principal at the school.

Mr. Petit thereupon entered Mr. Howlett's car for the purpose of ascertaining its ownership. While inside the car, Mr. Petit noticed bottles containing an alcoholic substance. Mr. Howlett later admitted to Mr. Petit that he had placed the bottles in the car. Mr. Petit immediately suspended Mr. Howlett from school for five days for violating a rule against possessing alcoholic beverages on school property.

Soon thereafter, Mr. Howlett filed suit in the Circuit Court for Pinellas County, Florida against the school board, Mr. Petit, and two other individuals -- Scott Rose (the superintendent of county schools) and William Grey (the school principal). The suit alleged that the defendants had violated various of Mr. Howlett's rights under the state and federal constitutions. Count I alleged that Mr. Howlett's right to be free from unreasonable searches and seizures was violated when Mr. Petit entered his car. Count II alleged that Mr. Howlett's suspension violated his rights to due process of law in that the evidence against Mr. Howlett was not substantial and in that the school rule under which he was suspended was impermissibly vague. Count III alleged that Mr. Howlett's suspension violated his procedural due process rights in that he was not afforded an adequate hearing prior to his suspension. The suit sought compensatory and punitive damages as well as an injunction against future violations of constitutional rights by school officials.

The circuit court granted Respondents' motion to dismiss, on the ground that suit was barred by the common law doctrine of sovereign immunity. The district court of appeal affirmed in February 1989. *Howlett v. Rose*, 537 So.2d 706 (Fla. Dist. Ct. App. 1989). The district court of appeal made clear that it was ruling against Mr. Howlett not because his suit failed to state a cause of action but because the Florida courts do not have jurisdiction to hear suits of the type filed by Mr. Howlett. *Id.* at 708. The Florida Supreme Court issued an unpublished order in May 1989 declining to review the case. This Court granted a petition for a writ of *certiorari* on November 13, 1989.

SUMMARY OF ARGUMENT

The Florida courts dismissed Mr. Howlett's suit on the ground that they do not have jurisdiction to hear § 1983 claims of the type raised by the suit. This Court has never addressed the issue of whether a State may decline to exercise jurisdiction over a federal § 1983 claim. An answer to that question requires an examination of the language of § 1983 and its legislative history. That examination reveals that Congress never intended to require states to exercise jurisdiction over § 1983 claims. To the contrary, Congress contemplated that a § 1983 action was a uniquely federal cause of action that would be brought almost exclusively in the federal courts. Congress' 1980 amendment to 28 U.S.C. § 1331 confirms that Congress never intended to require state courts to exercise jurisdiction over § 1983 actions.

Cases cited by Petitioner are distinguishable. The Court has consistently held that once a state court has accepted jurisdiction over a federal-law cause of action, it may not apply state procedural rules to defeat the cause of action. However, those cases have no application in this case, in which the Florida courts have declined altogether to exercise jurisdiction.

Florida does not discriminate in any way against federal-law causes of action. It applies the same jurisdictional rules to cases brought pursuant to the state constitution as it does to case brought pursuant to § 1983. Florida's action in limiting its jurisdiction is fully justified by its desire to relieve congestion in its courts.

ARGUMENT

I. THE STATE COURTS' DECISION WAS BASED ON A REFUSAL TO ASSERT JURISDICTION, NOT ON FAILURE TO STATE A CAUSE OF ACTION

Amici do not contend that Florida courts are entitled to exercise jurisdiction over suits under 42 U.S.C. § 1983 and then dismiss them on the merits on the basis of some state rule of decision that conflicts with the analogous federal rule of decision. This Court's decisions in *Felder v. Casey*, 108 S.Ct. 2302 (1988), and *Martinez v. California*, 444 U.S. 277 (1980), appear to preclude such treatment of federal causes of action in the state courts.

However, a close reading of the decision of the district court of appeal makes clear that the Florida courts did not act in this case in the manner proscribed by *Felder* and *Martinez*. While the decision may not have been a model of clarity, the district court of appeal did make clear the primary basis for its decision: that the Florida courts simply refuse to exercise jurisdiction over the type of suits brought by Mr. Howlett. Indeed, the district court of appeal distinguished *Martinez* on precisely that basis: it held that *Martinez* does not apply to cases where a state is exercising "immunity from the use of its courts" and has not "opened its own courts for federal actions against the state." *Howlett v. Rose, supra*, 537 So.2d at 708. The quoted language indicates that the district court of appeal held that the circuit court lacked jurisdiction to hear Mr. Howlett's lawsuit, not that his claims failed to state a cause of action.

The precise contours of the Florida courts' self-imposed limitation on their jurisdiction is not entirely clear from decisions of the various Florida appellate courts. It is not clear, for example, whether the state courts have ruled that they lack jurisdiction over all § 1983 lawsuits or whether (as seems to be the case) they will still exercise jurisdiction over § 1983 lawsuits brought against individuals sued in their individual capacities.[1] What is clear is that the Florida courts' rulings in this case were based on an absence of jurisdiction and were not rulings on the merits of the complaint.

If the Court has any doubts as to the basis of the decision below, its proper course of action is to remand this case to the state courts for further explanation. *See Employment Division of Human Resources of Oregon v. Smith*, 108 S.Ct. 1444 (1987). Failing that, the Court should accept at face value the ruling of the district court of appeal that Florida courts do not accept jurisdiction over cases of the type at issue here.

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[1] If, as *amici* suspect, Florida courts exercise jurisdiction over § 1983 suits brought against government officials in their individual capacities, then the circuit court must have considered that Respondents Rose, Grey, and Petit were being sued in their official capacities only. Petitioner appears to argue that his complaint should be read as a suit against Messrs. Rose, Grey, and Petit in their individual capacities. Petitioner's Brief at 22. However, the issue of whether the circuit court erred in categorizing the complaint as it applied to the individual defendants is not properly before the Court. Petitioner did not raise that issue in the courts below. This Court will not decide issues -- even issues raising federal constitutional questions -- raised for the first time on review of a state court decision. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

II. THIS CASE MUST BE DECIDED ON THE BASIS OF CONGRESS' INTENT WHEN IT ADOPTED 42 U.S.C. § 1983

This case raises an issue of first impression in this Court: whether a state court may decline to exercise jurisdiction over a claim brought under 42 U.S.C. § 1983. The Court stated in *Martinez* that the Court has never addressed or decided that issue. *Martinez*, *supra*, 444 U.S. at 283 n.7.

In addressing that issue, it is important to keep in mind the essential sovereignty of all 50 States within our federal system of government. States are to a large extent free to organize their local judiciary as they see fit. "[U]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 58 U.S.L.W. 4157, 4158 (Jan. 23, 1990).

Amici acknowledge that the U.S. government has the power under the Supremacy Clause to require state courts to exercise jurisdiction over federal-law causes of action. Nonetheless, a recognition of State sovereignty requires a conclusion that state courts are free to place limitations on their own jurisdiction unless those limitations conflict with some statutory policy established by Congress -- in which event the Supremacy Clause voids those limitations. Accordingly, in deciding this case, the Court should turn to the language and legislative history of § 1983 and should not rely on amorphous presumptions regarding state-court jurisdiction.

Section 1983, like most federal statutes, is silent regarding its enforceability in state courts. This Court has held that concurrent state-court jurisdiction over

federal-law causes of action is to be presumed in the absence of an express Congressional intent to the contrary. *Tafflin v. Levitt*, *supra*, 58 U.S.L.W. at 4158; *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). But to presume that Congress intended to *permit* a state court to exercise jurisdiction over a federal-law cause of action is a far cry from presuming that Congress intended to *require* a state court to do so. As the Court made clear in *Gulf Offshore*, "Federal law confers rights binding in state courts, *the subject-matter jurisdiction of which is governed in the first instance by state law.*" *Id.* at 478 (emphasis added).

The sovereign rights of a state judiciary to establish its own jurisdiction should not be overruled on the basis of the Supremacy Clause absent some clear indication from Congress that it intends they be overruled. As set forth below, there is no such clear indication in the legislative history of § 1983; rather, there are numerous indications that Congress, while intending to permit state courts to exercise jurisdiction over § 1983 lawsuits, did not intend to require them to do so.

III. IN ADOPTING § 1983, CONGRESS DID NOT INTEND TO REQUIRE STATES TO EXERCISE JURISDICTION OVER § 1983 ACTIONS

A. § 1983 Was Adopted Against a Backdrop of Congressional Distrust of State Courts.

What is now codified as 42 U.S.C. § 1983 had its origins in § 1 of the Civil Rights Act of 1871, 17 Stat.

13.[2] The Civil Rights Act of 1871 was adopted against a backdrop of Congressional distrust of state courts, particularly state courts in the South. Numerous members of Congress complained that while laws in the Southern States were adequate to protect civil rights, state courts were refusing to enforce those rights on behalf of blacks and Northern sympathizers. *See District of Columbia v. Carter*, 409 U.S. 418, 426-27 (1973). The Civil Rights Act of 1871 "was designed primarily in response to the unwillingness or inability of the state governments to enforce their own laws against those violating the civil rights of others." *Id.* at 426.

Of particular note was the inclusion in § 1 of the Civil Rights Act of 1871 of a provision conferring jurisdiction on the federal courts over the § 1983 right of action.[3] It should be borne in mind that in 1871 there was no general federal question jurisdiction, which was not adopted until 1875. *See* Act of March 3, 1875, § 1, 18 Stat. 470, now codified as 28 U.S.C. § 1331. Thus, § 1983 actions could not have been brought in federal courts absent the jurisdictional provision in § 1 of the Civil Rights Act of 1871. The Court has inter-

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[2] 42 U.S.C. § 1983 now provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[3] The jurisdictional provision of § 1 of the Civil Rights Act of 1871 is now codified as 28 U.S.C. § 1343(3).

preted the inclusion of the jurisdictional provision in the Act as an indication that Congress wanted § 1983 actions to be brought in the federal courts. *See Carter*, *supra*, 409 U.S. at 428-29 ("[section 1983] may be viewed as an effort 'to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and claims of citizens to the rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies'")(*quoting Monroe v. Pape*, 365 U.S. 167, 180 (1961)). *See also Will v. Michigan Department of State Police*, 109 S.Ct. 2304, 2309 (1989)("[a]lthough Congress did not establish federal courts as the exclusive forum to remedy these deprivations, it is plain that 'Congress assigned to the federal courts a paramount role' in this endeavor")(*quoting Patsy v. Board of Regents of Florida*, 457 U.S. 496, 503 (1982)).

The circumstances surrounding adoption of the Civil Rights Act of 1871 make it highly doubtful that Congress intended to *require* state courts to hear § 1983 actions. While Congress apparently was willing to permit state courts to exercise concurrent jurisdiction over § 1983 actions, it is inconceivable that Congress intended to require them to do so in light of Congress' total mistrust of their ability to dispense justice. At best, it might be claimed that Congress simply failed to focus on whether to require state courts to exercise jurisdiction over § 1983 actions. Such a claim cannot form the basis for a finding that Congress intended to overrule the right of sovereign States to establish the jurisdiction of their courts as they see fit.

B. When Congress Intended to Require State-Court Jurisdiction Over Federal Causes of Action, It Made Its Intention Clear.

A finding that Congress *sub silentio* invoked its Supremacy Clause power to require state courts to hear § 1983 actions would be particularly inappropriate in light of Congress' established practice in the 18th and 19th centuries to state explicitly when state courts were required to hear federal-law causes of action. For example, in *Testa v. Katt*, 330 U.S. 386, 390 (1947), the Court cited five 18th-century laws (that remained in effect well into the 19th century) that explicitly provided that jurisdiction lay in the state courts to enforce rights created by the laws.[4]

The federal statutes cited in *Testa* indicate that Congress knew how to say so explicitly when it intended to require state courts to hear federal-law causes of action. Congress' failure to make such a statement when it adopted the Civil Rights Act of 1871 indicates that it did not intend to overrule the rights of the sovereign states to establish the limits of state-court jurisdiction.

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[4] The five laws were the Judiciary Act of 1789, 1 Stat. 73, 77 (all suits by aliens for torts committed in violation of federal laws and treaties; all suits by the United States); 1 Stat. 376, 378 (1794)(fines, forfeitures, and penalties for violation of the License Tax on Wines and Spirits); 1 Stat. 373, 375 (1794)(the Carriage Act Tax); 1 Stat. 452 (penalty for purchasing guns from Indians); and 1 Stat. 733, 740 (1799)(criminal and civil actions for violations of the postal laws). Congress vested sole jurisdiction to enforce these federal laws in the state courts; federal courts were denied jurisdiction.

C. Permitting State Courts to Decline to Hear § 1983 Actions Would not Deprive Anyone of a Forum in Which to Vindicate His Rights.

Amici acknowledge that there should be a general presumption that rights created by the U.S. Constitution or by federal law are to be enforceable in some forum. Thus, if Congress adopts federal court jurisdictional requirements that do not permit federal rights to be enforced in the federal courts, one can safely assume -- in the absence of evidence to the contrary -- that Congress intended to require state courts to exercise jurisdiction over suits brought to enforce those federal rights. This Court has gone to great lengths to ensure that all federal rights are enforceable in some forum. Thus, in *General Oil Co. v. Crain*, 209 U.S. 211 (1908), the Court stated that it had jurisdiction to review a Tennessee state court's refusal to exercise jurisdiction over a Commerce Clause challenge to the constitutionality of a state tax being imposed on the plaintiff. Noting that the plaintiff was barred by the Eleventh Amendment from raising his Commerce Clause challenge in the federal courts, the Court reasoned that unless it asserted jurisdiction, "an easy way is open to prevent the enforcement of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation." *Id.* at 226.

There has never been any danger that § 1983 rights could not be vindicated in some forum, because the federal courts have had jurisdiction to hear § 1983 actions -- regardless of the dollar amount in controversy -- ever since the enactment of § 1983 in 1871. Thus, Mr. Howlett was free at all times -- both before and after the circuit court's dismissal on jurisdictional grounds -- to file his § 1983 action in federal court.

Given Congress' creation of federal court jurisdiction for all § 1983 actions, there is no basis for presuming that Congress intended to *require* state courts to provide an alternative forum for such actions; certainly, federal rights could be fully vindicated without the need for a state-court forum.

D. Congress' 1980 Amendment to 28 U.S.C. § 1331 Is Further Evidence That Congress Did Not Intend To Require States To Hear § 1983 Cases.

In 1980, Congress amended 28 U.S.C. § 1331, the statute conferring general federal question jurisdiction on the federal courts, in order to remove the minimum jurisdictional amount requirement.[5] Federal Question Jurisdictional Amendments Act of 1980, P.L. 96-486, 94 Stat. 2370 (1980). The legislative history of that amendment provides further evidence that Congress did not intend to require state courts to exercise jurisdiction over § 1983 actions.

The House Judiciary Committee, in explaining the reasons for eliminating the jurisdictional amount requirement, stated:

> It resolves the anomalous situation faced by persons who, although their Federal rights have been violated, are barred from a Federal forum solely because they have not suffered a sufficient economic injury. It represents sound principles of federalism by mandating that the Federal courts should bear the responsibility of deciding all questions of Federal law. *At the same time, it demonstrates an increased respect for the States by providing that federal claims should not be forced on the overburdened State court systems.*

H. Rep. No. 96-1461, 96th Cong., 2d Sess. (emphasis supplied). Congressional intent could not be more clear: Congress did not wish to force state courts to hear federal claims, and thus it eliminated the jurisdictional amount requirement from the federal court's federal question jurisdiction. It is difficult to imagine that a Congress concerned that it not overburden the state court systems would nonetheless invoke its powers under the Supremacy Clause to abrogate the States' sovereignty over their own court systems and require state courts to hear § 1983 claims.

IV. CASES CITED BY PETITIONER ARE DISTINGUISHABLE

In contending that States should not be free to decline jurisdiction over § 1983 actions, Petitioner relies principally on four decisions from this Court: *Felder*, *Martinez*, *Testa*, and *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1 (1912). Each of those cases is distinguishable from the case now before the Court. Each involved a state court that accepted jurisdiction over a federal claim; the Court ruled in each case that once a state court has accepted jurisdiction over a federal claim, it may not apply state procedural rules to defeat the federal claim.

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[5] When federal court jurisdiction over federal questions was established in 1875, jurisdiction was limited to cases in which the amount in controversy was greater than $500. That jurisdictional amount was increased to $2,000 in 1887, $3,000 in 1911, and $10,000 in 1958 before being eliminated in 1980. *See Carter*, *supra*, 409 U.S. at 427 n.20.

In this case, the Florida courts did not apply any state procedural rules to defeat a federal claim; they simply declined to exercise jurisdiction over the claim. The Court was concerned in *Felder* that permitting States to apply their procedural rules to federal claims brought in state court would lead to "different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court." *Felder*, *supra*, 108 S.Ct. at 2307. The refusal of Florida's courts to accept jurisdiction over certain federal claims creates no such danger. If a plaintiff mistakenly files a § 1983 claim against a local governmental body in state court in Florida and ends up having his complaint dismissed, he is free to re-file in federal court since a dismissal for lack of jurisdiction has no preclusive effect on future lawsuits. In contrast, the Wisconsin state court's dismissal in *Felder* was a dismissal on the merits and would have barred a subsequent suit on the same grounds in federal court.

Moreover, each of the decisions relied on by Petitioner disclaims any intention to dictate the jurisdiction of state courts. *See*, *e.g.*, *Mondou*, *supra*, 223 U.S. at 56 ("there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of the state courts"). Accordingly, the cases lend little support to Petitioner's thesis that Congress intended to require state courts to accept jurisdiction in § 1983 actions.

V. FLORIDA COURTS HAVE A LEGITIMATE INTEREST IN LIMITING THEIR JURISDICTION IN THE MANNER CHOSEN

Courts at both the federal and state levels have become increasingly clogged in recent years as the

number of new suits filed annually continues to skyrocket. A primary cause of court congestion has been the increasing number of lawsuits filed pursuant to § 1983. *See*, *e.g.*, *Parratt v. Taylor*, 451 U.S. 527, 554 n.13 (1981)(POWELL, J., concurring in result); *Patsy v. Board of Regents of State of Florida*, *supra*, 457 U.S. at 534 (POWELL, J., dissenting).

Florida has a legitimate interest in attempting to relieve congestion in its courts by declining to exercise jurisdiction in some or all § 1983 cases. As the legislative history of the Federal Question Jurisdictional Amendments Act of 1980 make clear (*see* page 14, *supra*), Congress shared Florida's concern that state courts not become congested with federal-law causes of action and therefore took steps to increase the subject matter jurisdiction of the federal courts. Florida courts cannot be faulted for taking steps to relieve court congestion by declining to hear certain federal claims, particularly when Congress has recognized that congestion of state courts with federal causes of action is a legitimate concern.

Studies have shown that suits alleging § 1983 causes of action are more likely to be frivolous than are other suits. For example, a recent study showed that plaintiffs in civil rights lawsuits are sanctioned under Rule 11 of the Federal Rules of Civil Procedure for filing frivolous lawsuits at a rate significantly higher than other litigants. *See* Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988). Mr. Howlett's suit is a prime example of a frivolous § 1983 lawsuit. His claim that the search of his car violated his Fourth Amendment rights has virtually no chance of success in view of this Court's ruling in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Mr. Howlett's due process claims are lacking in any merit, even if one accepts the facts as

alleged by Mr. Howlett. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975); *Lamb v. Panhandle Community Unit School District No. 2*, 826 F.2d 526 (7th Cir. 1987). The Florida courts are acting well within their rights in determining that they wish to avoid a crush of frivolous lawsuits by declining to accept jurisdiction over certain federal-law causes of action.

VI. FLORIDA COURTS ARE NOT IMPROPERLY DISCRIMINATING AGAINST FEDERAL CAUSES OF ACTION

Petitioner argues in the alternative that even if state courts are permitted under some circumstances to refuse to accept jurisdiction over federal causes of action, Florida has acted improperly in this case because it has in some way improperly "discriminated" against a federal cause of action. Petitioner notes, for example, that while Florida and its local governmental units have waived their sovereign immunity (at least to a degree) from common law tort suits, they have not done so for § 1983 actions. Petitioner's Brief at 24.

Petitioner's argument is without merit. The state-law analogue to a § 1983 suit is a suit for violation of rights under the Florida Constitution, not a common law tort action.[6] Florida does *not* permit suits in the state courts against the state and local governments alleging violation of rights under the state constitution. Indeed, Mr. Howlett raised such claims in this case, and the state courts declined to exercise jurisdiction over those

[6] *See Will v. Michigan Dept. of State Police, supra*, 109 S.Ct. at 2320 (BRENNAN, J., dissenting)("there is a substantial question" regarding whether Michigan can discriminate between suits based on the state constitution and suits based on the U.S. Constitution "only on the ground that one was a state suit and the other a federal one").

claims. Petitioner's "discrimination" argument appears to boil down to a claim that if a state court grants jurisdiction over *any* state-law claims against a particular class of defendants, then it must grant unlimited jurisdiction to all conceivable § 1983 claims against that class of defendants. Nothing in the decisions of this Court supports that argument.

Congress has always imposed restrictions on federal court jurisdiction in order to control the number of cases filed in the federal courts. For example, federal question jurisdiction in the federal courts was subject to a jurisdictional amount requirement until 1980, and diversity jurisdiction in the federal courts is still subject to a $50,000 jurisdictional amount. If Congress has approved measures designed to relieve court congestion by limiting federal court jurisdiction, there is no reason to believe that Congress intended to forbid the States from doing likewise. This Court has upheld similar jurisdictional amount requirements imposed within state court systems. *See Callen v. Bransford*, 139 U.S. 197 (1891). Florida's attempt to relieve congestion in its state courts by declining to accept jurisdiction over certain federal-law causes of action should be similarly upheld.

CONCLUSION

Amici respectfully request that the decision of the Florida district court of appeal be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK HOWLETT, a minor by and through Elizabeth Howlett, his mother, natural guardian and friend,

Petitioner,

v.

SCOTT ROSE, AS SUPERINTENDENT OF SCHOOLS for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT, and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,

Respondents.

On Writ of Certiorari to the District Court of Appeal of Florida Second District

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amici will address the following questions:

1. Whether a state court must entertain an action against a school board under 42 U.S.C. § 1983 notwithstanding a neutral state rule that divests state courts of jurisdiction to hear suits against political subdivisions of the State.

2. Whether Florida school boards are "persons" within the meaning of Section 1983.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-5383

MARK HOWLETT, a minor by and through
Elizabeth Howlett, his mother,
natural guardian and friend,
Petitioner,

v.

SCOTT ROSE, AS SUPERINTENDENT OF SCHOOLS for Pinellas County, Florida; WILLIAM GREY, THOMAS PETIT, and THE SCHOOL BOARD OF PINELLAS COUNTY, FLORIDA,
Respondents.

**On Writ of Certiorari to the
District Court of Appeal of Florida
Second District**

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and officials throughout the United States; they have a compelling interest in legal issues that affect state and local governments.

Amici and their members will be directly affected by the Court's resolution of the issues in this case: when

state courts must entertain federal causes of action, and which state-created entities are subject to suit under 42 U.S.C. § 1983. The States' control over their own court systems is an essential element of their sovereignty; petitioner's attempt to impose limits on the Florida authority to construct neutral jurisdictional rules accordingly threatens a significant interference with traditional state prerogatives. At the same time, an expansive application of Section 1983 would have a direct financial impact on States and localities. *Amici* therefore submit this brief to assist the Court in the resolution of this case.[1]

STATEMENT

1. Petitioner was a student at St. Petersburg High School in Pinellas County, Florida. According to petitioner's complaint, on October 9, 1986, petitioner parked his locked car on school grounds in a manner that, in the judgment of school officials, obstructed the movement of construction vehicles in the area. J.A. 4-5. Thomas Petit, an assistant school principal, accordingly pushed open a side vent window in an attempt to determine who owned the vehicle. J.A. 4. Petit apparently gained entry to the vehicle (*ibid.*) and, while inside, discovered several bottles that had contained alcoholic beverages. J.A. 5. Petitioner thereafter received a five-day suspension from school for violating regulations that prohibited the possession of alcohol by students. J.A. 6.

In response, petitioner brought this suit in state court under 42 U.S.C. § 1983 against several school officials and respondent school board, asserting that the entry into his car denied him his Fourth Amendment rights (J.A. 6), that the school regulations relating to the possession of alcohol were unconstitutionally vague (J.A. 8-9), and that the suspension denied him due process. J.A. 10. Petitioner demanded damages, injunctive relief, and an award of attorney's fees. J.A. 7-8, 8-9, 11-12. The

[1] The parties' letters of consent pursuant to Rule 37.3 of the Rules of this Court have been filed with the Clerk of the Court.

suit was dismissed by the trial court in a one-sentence order. J.A. 19.

2. The district court of appeals affirmed the dismissal. J.A. 24-27.[2] Relying on *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987), cert. denied, 108 S.Ct. 1024 (1988), the court held that, "when a section 1983 action is brought in *state* court, the sole question to be decided on the basis of *state* law is whether the state has waived its common law sovereign immunity to the extent necessary to allow" the action. J.A. 26 (emphasis in original). Because "[t]here is no question under Florida law that agencies of the state, including school boards[,]" retain sovereign immunity (*ibid.*), the court concluded that it could not entertain petitioner's suit. The court added that this Court's decision in *Martinez v. California*, 444 U.S. 277 (1980), was not controlling because "[t]he question of whether a state has opened its own courts for federal actions against the state which the state does not otherwise recognize is purely a question of state law." J.A. 27.[3]

The Florida Supreme Court denied review. J.A. 28.

[2] Petitioner suggests (Br. 17-19) that the district court of appeal's decision leaves some doubt about whether Florida courts will entertain Section 1983 actions against either government officials sued in their individual capacities or officials sued for injunctive relief in their official capacities. In fact, however, the issues presented on appeal by petitioner did not relate to the dismissal of the action against the individual defendants (see J.A. 24-25), and it appears that the district court of appeal accordingly did not consider that element of the case to be before it.

[3] The court explained that the controlling issue raised by petitioner was "whether the question of a state and its subdivisions' sovereign immunity to an action brought in a state court under the Federal Civil Rights Act of 1871, 42 U.S.C. § 1983, is a question of state or federal law?" J.A. 24. Because petitioner focused on that legal point, the court indicated that "[t]he question of the scope of that sovereign immunity, or whether a particular act is protected by that sovereign immunity, is not before us on this appeal, nor was it before the trial court" (J.A. 25), adding that "[t]he extent of that sovereign immunity and its applicability under Florida law in this case has not been addressed by [petitioner]." J.A. 26.

SUMMARY OF ARGUMENT

A. The court below dismissed petitioner's suit because, absent a waiver of sovereign immunity, the Florida Constitution divests the state courts of jurisdiction to entertain claims against the State or its political subdivisions; absent such a waiver, state courts therefore have no authority to hear Section 1983 claims (or any other claims, for that matter) against Florida school boards. Against this background, the Court's decisions in *Martinez v. California*, 444 U.S. 277 (1980), and *Felder v. Casey*, 108 S.Ct. 2302 (1988), upon which petitioner in large part relies, are simply inapposite. In both of those cases state courts had accepted jurisdiction of the federal claim. Here, in contrast, the controlling question is one left open in *Martinez* and *Maine v. Thiboutot*, 448 U.S. 1 (1980): whether and in what circumstances state courts must entertain Section 1983 claims.

B. In a series of cases decided between 1912 and 1950, the Court set out the principles that determine when—in the absence of clear guidance from Congress—state courts must take jurisdiction of suits grounded on federal law. These decisions make clear that a state court, if it has jurisdiction to hear the suit and entertains analogous state-law claims, may not decline to adjudicate a particular federal action simply because it disagrees with the policy effectuated by federal law; it necessarily follows that state courts may not discriminate against federal causes of action. At the same time, however, state courts are under no obligation to disregard even-handed jurisdictional limitations that exclude both state and federal claims. The unifying principle of these decisions is plain. Under the Supremacy Clause, a State must treat a federal cause of action as its own substantive law, and must open its courts to such actions to the same extent—but only to the same extent—that it opens them to state-created claims. A straightforward application of this principle disposes of petitioner's suit: Florida's fundamental law divests state courts of jurisdiction to entertain actions against the State or its political subdivisions.

Petitioner attempts to circumvent this principle by arguing that Florida has waived its immunity selectively in a manner that discriminates against federal claims. In fact, however, Florida's tort claims statute precludes state courts from entertaining *any* claim against the State or its political subdivisions—whether based on state or on federal law—that challenges law enforcement activities or other discretionary exercises of government power. This plainly was the view of the court below, which explained that petitioner was asking Florida to "open[] its own courts for federal actions against the state *which the state does not otherwise recognize*." J.A. 27 (emphasis added). In any event, even if we are wrong in this and Florida's waiver of immunity is understood to be discriminatory, the choice of remedy (whether expansion or contraction of the waiver) should be left to the state courts to settle as a matter of state law.

C. Petitioner's contention that the state courts should be obligated to entertain Section 1983 actions even in the absence of discrimination between state and federal claims is insupportable. His argument would require a dramatic extension of this Court's decisions, which never have held that the state courts are obligated to entertain federal actions when those courts do not hear analogous suits based on state law. And petitioner's approach would sweep aside doubts about Congress's constitutional authority to expand the jurisdiction of unwilling state courts—doubts that have particular force in the area of sovereign immunity. At a minimum, the Court should not attempt to resolve the difficult questions about the scope of national authority in this area, and should not countenance such a substantial intrusion on the State's sovereign prerogatives, unless Congress has made absolutely clear its intention to require the exercise of state court jurisdiction.

Yet it is plain that Congress had no such intention here. To the contrary, Congress's very purpose in enacting Section 1983 was the creation of a federal remedy that would allow federal courts to substitute for ineffectual state courts in protecting federal rights. Indeed, in the statute's original form, the federal courts had exclusive jurisdiction to entertain claims under Section 1983; while the provisions conferring exclusive jurisdiction were dropped over the years during routine revisions of the Judicial Code, Congress never suggested that it was imposing affirmative obligations on state courts. Indeed, had such an unlikely proposal been made, the 42d Congress surely would have thought itself without the constitutional authority to require the exercise of state court jurisdiction over Section 1983 actions. It is hardly likely that a statute emerging from such a tradition was intended to impose uniquely burdensome obligations on state courts.

D. Even if the Court concludes that the Florida courts are obligated to exercise jurisdiction over petitioner's claim, there is reason to doubt that respondent school board is a proper defendant in a Section 1983 action. The Court's holding in *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989), that States are not "persons" within the meaning of Section 1983 extends to all governmental entities that are considered arms of the State for Eleventh Amendment purposes. Whether a particular school board has characteristics that make it a "nonperson" accordingly depends on the nature of the entity created by state law. Here, Florida school boards are, by statute, treated identically to state agencies for sovereign immunity purposes. The State retains responsibility for public education, and has prescribed detailed requirements relating to virtually every aspect of the education system. The State also provides over one-half of respondent school board's funding. These factors strongly suggest that Florida school boards are arms of the State; at a minimum, this Court (if it requires the exercise of state court jurisdiction) should remand the case so that the court below may, in the first instance,

have an opportunity to analyze state law with this issue in mind.

ARGUMENT

COUNTY SCHOOL BOARDS ARE NOT AMENABLE TO SUIT IN FLORIDA STATE COURTS UNDER 42 U.S.C. § 1983

A. Florida Courts Lack Jurisdiction To Entertain Section 1983 Claims Against School Boards

In suggesting that this is an "immunity case[]" (Br. 7), petitioner views the issue here from the wrong perspective. The outcome below did not involve the use of state-created defenses or procedural rules to defeat a federal cause of action, as petitioner seems to suppose. See Pet. Br. 8-16. The court of appeal's decision turned, instead, on consideration of a more complex issue: whether a state court that is precluded from hearing an action by a neutral limitation on its jurisdiction—and that does not entertain analogous state-created suits—nevertheless must consider and resolve the merits of a claim simply because it is grounded on federal law. The court below properly concluded that the federal Constitution imposes no such obligation on state courts.

1. *Florida courts do not entertain Section 1983 actions against governmental units that share the State's sovereign immunity.*

Although petitioner suggests that there is some doubt on this point (Br. 17-19), we think it clear that the court below dismissed petitioner's action because it concluded that Florida courts lack jurisdiction to entertain Section 1983 claims against political subdivisions of the State. The court explained that the question before it was "whether the state has waived its common law sovereign immunity to the extent necessary to allow a section 1983 action in state court" (J.A. 26), an inquiry it considered equivalent to "[t]he question of whether [the] state has opened its own courts for federal actions against the state which the state does not otherwise recognize." J.A. 27. Answering these questions in the negative required

the court to dismiss for lack of jurisdiction. The common law immunity of Florida and its political subdivisions—which plainly include county school boards [4]—is grounded, after all, in the state Constitution [5]; and in Florida, as in most States, that common law "immunity from suit relates to subject matter jurisdiction." *Schmauss v. Snoll*, 245 So.2d 112, 113 (Fla. 3d DCA 1971). Our reading of the decision below, it should be added, is consistent with other holdings making clear that Florida courts will entertain Section 1983 actions against individuals,[6] but not against the State or political subdivisions clothed with sovereign immunity.[7]

[4] "County boards of public instruction are agencies of the State and as such are clothed with the same degree of immunity from suit as is the State. * * * [C]ounty school boards are part of the machinery of government operating at the local level as an agency of the State in the performance of public functions." *Buck v. McLean*, 115 So.2d 764, 765 (Fla. 1st DCA 1959). See also, *e.g.*, *Richter v. Dade County Board of Public Instruction*, 91 So.2d 794 (Fla. 1957); *Bragg v. Duval County Board of Public Instruction*, 36 So.2d 222 (Fla. 1948).

[5] See Fla. Const. Art. X, § 13 ("Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating"). Although this provision in terms addresses only the possibility of waiver, "Florida courts have often interpreted the language in Article X, Section 13, * * * as providing absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment." *Circuit Court v. Department of Natural Resources*, 339 So.2d 1113, 1114 (Fla. 1976).

[6] See, *e.g.*, *Lloyd v. Ellis*, 520 So.2d 59, 60 (Fla. 1st DCA 1988); *Chapman v. State Dept. of Health & Rehabilitative Services*, 517 So.2d 104, 105-106 (Fla. 3d DCA 1987); *Arney v. Department of Natural Resources*, 448 So.2d 1041, 1045 (Fla. 1st DCA 1984); *Penthouse, Inc. v. Saba*, 399 So.2d 456, 458-459 (Fla. 2d DCA), rev. denied, 408 So.2d 1095 (Fla. 1981).

[7] See, *e.g.*, *Lloyd*, 520 So.2d at 60; *Spooner v. Department of Corrections*, 514 So.2d 1077, 1078 (Fla. 1987); *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987), cert. denied, 108 S.Ct. 1024 (1988); *Skobolow v. Ameri-Manage, Inc.*, 483 So.2d 809, 811 & n.1 (Fla. 3d DCA 1986), aff'd, 514 So.2d 1077 (Fla. 1987); *City of North Miami v. Schy*, 408 So.2d 670 (Fla. 3d DCA 1981). As petitioner notes (Br. 18 n.19), several Florida district courts of appeal have entertained Section 1983 actions against localities (and, in one case, a school board) without any discussion of the jurisdictional issue. See, *e.g.*, *Franklin County School Board v. Page*, 540 So.2d 891, 892 (Fla. 1st DCA 1989); *City of Riviera Beach v. Langevin*, 522 So.2d 857, 860, 866-868 (Fla. 4th DCA 1987); *Southern Alliance Corp. v. City of Winter Haven*, 505 So.2d 489, 493-494 (Fla. 2d DCA 1987); *Higdon v. Metropolitan Dade County*, 446 So.2d 203, 205-208 (Fla. 3d DCA 1984). Given the Florida Supreme Court's denial of review in this case, those decisions cannot be viewed as authoritative statements of the law in Florida.

Against this background, the Court's decisions in *Martinez v. Californiq*, 444 U.S. 277 (1980), and *Felder v. Casey*, 108 S.Ct. 2302 (1988), upon which petitioner in large part relies (Br. 7-16), are simply inapposite. In *Martinez*, the state court had "accepted jurisdiction of th[e] federal claim" (444 U.S. at 283 n.7); in holding that a state-created immunity that "merely provide[d] a defense" to that claim (*id.* at 281) could not have a dispositive effect (*id.* at 284 & n.8), the Court carefully reserved the question whether and in what circumstances "a State *must* entertain a claim under § 1983." *Id.* at 283 n.7 (emphasis in original). *Felder*, which held that state courts may not use their own outcome-determinative procedural rules in adjudicating Section 1983 suits (see 108 S.Ct. at 2306-2307), also was a case where the state court had accepted jurisdiction over the federal action (see *ibid.*); the decision therefore does not address the scope of a state court's obligation to entertain Section 1983 actions in the first instance. See S. Steinglass, *Section 1983 Litigation in State Court*, § 9.3(c) at 9-17 (1988). It is that question, which the Court left open in *Martinez* and *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980), that is controlling here.

2. *The Federal Constitution does not require Florida courts to entertain Section 1983 actions when they lack jurisdiction to hear analogous state-law claims.*

The Court has not had much occasion to consider the obligation of state courts to entertain federal claims; historically, the Court more often has addressed its at-

tention to the question of when willing state courts should be *permitted* to assume jurisdiction over actions grounded on federal law. See, *e.g.*, *Tafflin v. Levitt*, No. 88-1650 (Jan. 22, 1990), slip op. 3 (citing cases); Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 Sup. Ct. Rev. 187, 203. In that setting, the Court has long made clear that, "if exclusive jurisdiction [in the federal courts] be neither express nor implied, the State courts have concurrent jurisdiction whenever, by their own constitution, they are competent to take it." *Claflin v. Houseman*, 93 U.S. 130, 136 (1876). *See Tafflin*, slip op. 3. But in a series of six cases decided between 1912 and 1950, the Court set out the principles that determine when—in the absence of clear guidance from Congress—state courts *must* take jurisdiction of suits grounded on federal law.

a. In *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1 (1912), *McKnett v. St. Louis & S.F. Ry.*, 292 U.S. 230 (1934), and *Testa v. Katt*, 330 U.S. 386 (1947), where the Court required unwilling state courts to entertain federal actions, it emphasized that those courts already had jurisdiction adequate to resolve the federal suit, and in fact entertained analogous state-law claims. See *Mondou*, 223 U.S. at 55-57; *McKnett*, 292 U.S. at 232-233; *Testa*, 330 U.S. at 394. See also *FERC v. Mississippi*, 456 U.S. 742, 760 (1982). In these circumstances, where Congress had made no "attempt to enlarge or regulate the jurisdiction of state courts" (*Mondou*, 223 U.S. at 56), the *Mondou* Court made clear that a state court "'is just as much bound to recognize [federal laws] as operative within the State as it is to recognize the state laws.'" 223 U.S. at 58, quoting *Claflin*, 93 U.S. at 137. In reaffirming this approach, the Court in *Testa* explained that the obligation of state courts to enforce federal law is grounded on the Supremacy Clause, again relying on *Claflin* to "repudiate[] the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign."

330 U.S. at 390-391. The *Testa* Court accordingly held that a State could not "establish[] policy against enforcement by its courts of statutes of other states and the United States which it deems penal." *Id.* at 392. And in *McKnett*, the Court looked by analogy to the Privileges and Immunities and Full Faith and Credit Clauses in holding that a state court may not refuse to adjudicate an action "solely because the suit is brought under a federal law." 292 U.S. at 233-234.

Conversely, in three decisions issued during the same period—all of which, like *Mondou* and *McKnett*, involved actions under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60—the Court affirmed the power of state courts to decline to entertain certain federal actions. In *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929), the Court, citing *Mondou*, held that a State's policy of giving preference in its courts to suits by state residents provided a "valid excuse" (279 U.S. at 388) for dismissal of a federal action against a foreign corporation by a nonresident. *Id.* at 386-388. The Court reaffirmed that decision in *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950), holding that a state court may decline to adjudicate a federal action "if in similar [state-law] cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially [citing *McKnett*], so as not to involve a discrimination against Employers' Liability Act suits." *Id.* at 4; see *id.* at 5. And in *Herb v. Pitcairn*, 324 U.S. 117 (1945), the Court upheld a State's authority to dismiss a federal action that had been brought in a state court of limited jurisdiction, explaining that application of such an evenhanded jurisdictional limitation is a "'valid excuse'" that justifies dismissal. *Id.* at 120, quoting *Douglas*, 279 U.S. at 387-388.

These holdings effectively establish a series of presumptions that control the actions of state courts in the absence of clear congressional directives either precluding or purporting to require the exercise of state-court jurisdiction. Under *Claflin* and its progeny, state courts

are presumptively authorized to entertain claims grounded on federal law, so long as they have jurisdiction to do so under their own state constitutions. Under *Mondou*, *McKnett*, and *Testa*, a state court, if it has jurisdiction to hear the suit and entertains analogous state-law claims, may not decline to adjudicate a particular federal action simply because it disagrees with the policy effectuated by the federal law; it necessarily follows that state courts may not discriminate against federal causes of action. At the same time, however, *Douglas*, *Mayfield*, and *Herb* make clear that state courts are under no obligation to disregard evenhanded jurisdictional limitations that exclude both state and federal claims. The rationale for this approach (and the unifying principle of the decisions) is plain: under the Supremacy Clause, a State must treat a federal cause of action as its own substantive law, and must open its courts to such actions to the same extent—but only to the same extent—that it opens them to analogous state-created claims.[8]

A straightforward application of these principles is enough to dispose of this case. As we explain above, Florida's fundamental law—its State Constitution—divests state courts of jurisdiction to entertain claims against the State's political subdivisions. So long as Florida applies this rule evenhandedly to bar analogous

[8] This principle is fully applicable in Section 1983 suits. *Martinez* itself, in addressing the scope of state-court jurisdiction to entertain Section 1983 actions, suggested that state courts are under an obligation to hear federal claims "where the same type of claim, if arising under state law, would be enforced in the state courts." 444 U.S. at 283 n.7. Thus a commentator who is generally sympathetic to petitioner's view of the law has noted, pointing to *Martinez*, that "the Court's comment about the nondiscrimination bar suggests that as long as state courts act evenhandedly, they may decline to entertain certain § 1983 actions." Steinglass, *supra*, § 9.2 at 9-4. See *id.* § 9.3(b) at 9-13 ("To exclude § 1983 cases, states would have to close their courts to similar actions authorized by state and federal law against state and local governmental bodies and their employees").

state-law claims against the same category of defendants, petitioner's challenge to the Florida rule "clearly oversteps Testa's bounds: How can a state be charged with discrimination against a federal claim when it allows no suits in state courts against the sovereign?" L. Tribe, *American Constitutional Law* 184 n.45 (2d ed. 1988).

b. In an attempt to circumvent these principles, petitioner suggests (Br. 20-23) that Florida has waived its immunity selectively in a manner that discriminates against federal claims. This suggestion, in our view, is a flat misstatement of Florida law. In fact, under Florida's tort claims statute, Fla. Stat. § 768.28, state courts will not entertain *any* claim against the State or its political subdivisions—whether based on state or federal law—that challenges law enforcement activities or other discretionary exercises of governmental power.[9] This plainly was the view of the court below, which explained that petitioner was asking Florida to "open[] its own courts for federal actions against the state *which the state does not otherwise recognize*." J.A. 27 (emphasis added).

[9] The line drawn by Florida's tort claims statute thus is not the one between state and federal claims; it is, instead, the line "between tort claims and other civil suits, which would, of course, include federal civil rights actions." *Shinholster v. Graham*, 527 F. Supp. 1318, 1335 (N.D. Fla. 1981). Indeed, in at least one respect Florida provides uniquely favorable treatment to federal civil rights actions. The State makes insurance against adverse judgments available through a risk management trust fund. Fla. Stat. §§ 284.30-.33. But judgments payable under Section 1983 and other federal civil rights statutes, unlike all other claims payable from the fund, are not subject to ceilings set out in the state tort claims act. Fla. Stat. § 284.38. It should be added that there is nothing surprising in the fact that the federal decisions cited by petitioner (Br. 20-21) on the scope of the tort claims act's waiver specifically address themselves to federal civil rights claims; the question in those cases was whether Florida had waived its Eleventh Amendment immunity against suit in federal court. See *Gamble v. Florida Dept. of Health & Rehabilitative Services*, 779 F.2d 1509, 1515 (11th Cir. 1986); *Shinholster*, 527 F. Supp. at 1329-1332. See also, *e.g.*, *Cate v. Oldham*, 707 F.2d 1176, 1182 n.4 (11th Cir. 1983); *Meeker v. Addison*, 586 F. Supp. 216, 220 (S.D. Fla. 1984).

The district court of appeal's reading of Florida law is controlling here, and an examination of that law in any event confirms that petitioner is asking for uniquely favorable treatment. The Florida tort claims statute provides that the State and its political subdivisions are liable in tort only "in the same manner and to the same extent as a private individual under like circumstances." Fla. Stat. § 768.28(5). As interpreted by the Florida courts, this language leaves sovereign immunity intact where the challenged governmental action involves " 'discretionary' functions, including policy-making, planning or judgmental decisions," and thus draws a line very similar to that of the traditional distinction between governmental and proprietary activities.[10] In particular, immunity continues to clothe "discretionary functions of government [that] are inherent in the act of governing" (*Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912, 918 (Fla. 1985))—a category that includes exercises of police power[11] and, more generally, activity relating to law enforcement and public safety.[12]

[10] Comment, *The Florida Supreme Court's View of State Sovereign Immunity: An Exercise in Confusion Producing Restrictive Results*, 15 Stet. L. Rev. 831, 837, 852 (1986).

[11] See, *e.g.*, *Rosenberg v. Kriminger*, 469 So.2d 879, 880-881 (Fla. 3d DCA 1985); *Carter v. City of Stuart*, 468 So.2d 955, 956-957 (Fla. 1985); *Everton v. Willard*, 468 So.2d 936, 938-939 (Fla. 1985); *Butler v. State*, 450 So.2d 1282, 1283 (Fla. 2d DCA 1984), approved, 469 So.2d 1382 (Fla. 1985).

[12] See, *e.g.*, *Conover v. Board of County Commissioners*, 527 So.2d 946 (Fla. 3d DCA 1988); *Delgado v. City of Miami Beach*, 518 So.2d 968, 969 (Fla. 3d DCA 1988); *Parker v. Murphy*, 510 So.2d 990, 991 (Fla. 1st DCA 1987); *Palumbo v. State Game & Fresh Water Fish Comm'n*, 487 So.2d 352, 353-354 (Fla. 1st DCA 1986); *City of Delray Beach v. Watts*, 461 So.2d 142 (Fla. 4th DCA 1984), rev. denied, 475 So.2d 696 (Fla. 1985); *Department of Transportation v. Neilson*, 419 So.2d 1071, 1077-1078 (Fla. 1982); *Bumbough v. City of Tampa*, 403 So.2d 1139, 1141-1142 (Fla. 2d DCA 1981); *Elliott v. City of Hollywood*, 399 So.2d 507, 509 (Fla. 4th DCA 1981); *Payne v. Palm Beach County*, 395 So.2d 1267, 1268 (Fla. 4th DCA 1981); *Ellmer v. City of St. Petersburg*, 378 So.2d 825, 827 (Fla. 2d DCA 1979). In addition, although it is not, strictly speaking, an immunity, governmental entities in Florida have no liability for exercises of their "discretionary power to enforce compliance with the laws" because that "is a matter of governance, for which there has never been a common law duty of care." *Trianon Park*, 468 So.2d at 919. See, *e.g.*, *Kaisner v. Kolb*, 509 So.2d 1213, 1216-1217 (Fla. 2d DCA 1987); *City of Daytona Beach v. Palmer*, 469 So.2d 121, 122-123 (Fla. 1985).

Unlike the state-law negligence suit hypothesized by petitioner (Br. 21),[13] the challenged action here involved an exercise of judgment about how best to preserve public safety—precisely the sort of state action that retains immunity in Florida from claims grounded on state law. Because state courts lack jurisdiction to entertain such suits against the State and its political subdivisions when they are based on Florida law, denial of jurisdiction over this federal action is permissible: "in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially." *Mayfield*, 340 U.S. at 4.

We should add that even if we are wrong in our reading of Florida law—so that the state tort claims act is understood to be inconsistent with the Supremacy Clause because it discriminates against federal claims—it is not at all clear that the court below should be required to entertain petitioner's action. The gist of petitioner's challenge to the decision below is that Florida's juris-

[13] In fact, petitioner is in no position to argue now that his particular claim would have been treated differently had it been based on state law. As the court below explained, petitioner's arguments to the state courts were directed entirely to the legal question whether sovereign immunity was relevant; as a consequence, "[t]he extent of that sovereign immunity and its applicability under Florida law in this case [was] not addressed by [petitioner]" below. J.A. 26. See page 3 n.3, *supra*. In any event, so far as petitioner's hypothetical is concerned, it is not at all clear that a political subdivision would be liable in a state common law action for negligence growing out of a traffic accident that was in some way related to a discretionary judgment involving law enforcement. See generally *Everton v. Willard*, 468 So.2d 936, 938-939 (Fla. 1985); *Kaisner v. Kolb*, 509 So.2d 1213, 1216-1217 (Fla. 2d DCA 1987).

dictional scheme authorizes the state courts to hear an impermissibly small category of claims and therefore is underinclusive. But in related areas involving similar challenges to underinclusive state programs, the Court has left it to the state courts to determine, as a matter of state law, whether constitutional defects should be remedied by expanding or contracting the pool of beneficiaries. See, *e.g.*, *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890, 895-896 (1989) (plurality opinion); *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 227 (1987); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 624 (1985); *Zobel v. Williams*, 457 U.S. 55, 64-65 (1982); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 152-153 (1980); *Orr v. Orr*, 440 U.S. 268, 272 (1979). Cf. *Heckler v. Mathews*, 465 U.S. 728, 739, 740 n.8 (1984); *Califano v. Westcott*, 443 U.S. 76, 93-95 (1979) (opinion of Powell, J.). Here, there is reason to doubt that Florida would choose to remedy the defect in its tort claims statute (assuming that one exists) by expanding rather than contracting its waiver of immunity. Cf. *Shinholster v. Graham*, 527 F. Supp. 1318, 1334 (N.D. Fla. 1981). If this Court determines that Florida law is discriminatory, the choice of remedy accordingly should be left to the state court on remand.

3. *Section 1983 should not be read to confer jurisdiction on state courts.*

The conclusion that Florida has a nondiscriminatory jurisdictional rule that bars the assertion of particular Section 1983 actions in its courts should be the end of this case. Petitioner nevertheless asserts (Br. 23-28) that, even in the absence of discrimination between state and federal claims, the Florida courts have an obligation to exercise jurisdiction here because their refusal to do so somehow reflects an impermissible disagreement with federal policy.[14] Curiously, however, while the validity of

[14] Petitioner appears to suggest (Br. 16) that, even if state jurisdictional rules may exclude Section 1983 claims from state court altogether, those rules may not exclude only limited categories of

this argument ultimately must turn on the meaning of Section 1983, petitioner makes virtually no mention of the statute's language or legislative history. Yet federal statutes surely should not be read as an attempt to override neutral state jurisdictional rules absent some indication that Congress had such a goal in mind. And it is plain that, in Section 1983, Congress had no such intention.

a. As an initial matter, petitioner's argument would require a dramatic extension of this Court's decisions. The Court never has held that state courts have an obligation to entertain nonanalogous federal actions. See Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 507 (1954). Cf. *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 287 (1973). To the contrary, as we explain above, every decision in which the Court has required state courts to resolve federal claims has taken care to emphasize that those courts already had ample jurisdiction to entertain analogous state-law suits. Indeed, the Court's infrequent comments on the issue raise doubts that Congress has the constitutional authority to expand the jurisdiction of unwilling state courts. See *Brown v. Gerdes*, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring) ("Neither Congress nor the British Parliament nor the Vermont Legislature has power to confer jurisdiction upon the New York courts"); *Claflin*, 93 U.S. at 141 ("Not that Congress could confer jurisdiction upon the State courts"). In this regard, it should be added that the discovery of such congressional authority is not necessary to safeguard federal interests: "[s]ince the rights involved are based upon Acts of Congress, there is no reason to fear that Congress would fail to give adequate protection to

Section 1983 cases. It is not all clear, however, why this should be so. Neutral jurisdictional rules routinely preclude suits against certain categories of defendants; in the federal courts, for example, both the Eleventh Amendment and the United States' own sovereign immunity have this effect. Indeed, the jurisdictional limitations upheld in *Douglas* and *Mayfield* excluded only subclasses of FELA claims because of the State of residence of the plaintiff or defendant.

these rights" by making an action available in the federal courts. Sandalow, *supra*, 1965 Sup. Ct. Rev. at 207 n.85.[15]

These doubts about congressional power have particular force in the area of sovereign immunity, when (as in this case) a federal statute is asserted to require a State's courts to entertain claims against the State or its political subdivisions.[16] We are not aware of any case in which the Court has addressed the scope of Congress's authority in such circumstances—apparently because the National Government never has attempted to confer such jurisdiction on unwilling state courts. Cf. *FERC*, 456 U.S. at 759, 764-765. It is clear, however, that from the time of the ratification of the Constitution it has been "an 'established principle of jurisprudence' that the sovereign cannot be sued in its own courts without consent." *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2310 (1989), quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858). See *Nevada v. Hall*, 440 U.S. 410, 420 (1979); *id.* at 431 (Blackmun, J., dissenting). In the infrequent instances when the issue has been litigated, the Court accordingly has indicated that States may assert sovereign immunity to preclude even federal

[15] There is nothing anomalous in the idea that state law may in some circumstances preclude the assertion of federal claims in state court; so long as there is no discrimination against federal claims, a State may, for example, require compliance with evenhanded procedural rules before its courts are allowed to consider claims grounded on federal law. See, *e.g.*, *Jimmy Swaggart Ministries v. Board of Equalization*, No. 88-1374 (Jan. 17, 1990), slip op. 18-19; *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978).

[16] As petitioner explains at some length (Br. 11-13), the Eleventh Amendment confers an immunity from suit in federal court only upon entities that are considered arms of the State, a category that generally does not include the State's political subdivisions. See pages 25-28, *infra*. For the purposes of its own courts, however, the State plainly may define itself (and describe the entities that share its sovereignty) however it wishes; that power is itself a sovereign prerogative. And as we note above (at 8 & n.4), Florida has treated school boards as state agents that are clothed with sovereign immunity.

constitutional claims in state court. See *Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929); *Palmer v. Ohio*, 248 U.S. 32, 34 (1918); *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 642 (1911); *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446, 451 (1883); *Railroad Co. v. Tennessee*, 101 U.S. 337, 339 (1880).[17]

It is of course true, as the plurality indicated in *Pennsylvania v. Union Gas Co.*, 109 S.Ct. 2273, 2285 (1989), that the States are deemed to have consented to the assertion against them in *federal court* of suits "based on

[17] Citing *General Oil Co. v. Crain*, 209 U.S. 211 (1908), petitioner asserts (Br. 24-25) that a State may not assert sovereign immunity in its own courts against a federal constitutional claim. But *Crain* —which predated many of the decisions we cite above—is slender authority for such a profound proposition, "for more reasons than just the age and moderate obscurity of the case." Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1095-1096 (1983). *Crain* was an action brought in state court against a state official seeking injunctive relief for an asserted violation of the Commerce Clause. Before dismissing the challenge on the merits, the Court rejected the State's argument that its courts lacked jurisdiction to hear the claim; the Court seemingly reasoned that the Eleventh Amendment would make injunctive relief unavailable in federal court and that there must be some means of enforcing the Constitution in some court. 209 U.S. at 226-227. But the proposition upon which the Court grounded its jurisdictional discussion—its assumption about the scope of the Eleventh Amendment—"overlooks the fact that [*Ex Parte*] *Young* [209 U.S. 123 (1908)] rejected the position that the Eleventh Amendment bars suit in a federal court against a state officer acting under an allegedly unconstitutional authority." Sandalow, *supra*, 1965 Sup. Ct. Rev. at 209 n.89. Justice Harlan thus concurred separately, maintaining that the existence of jurisdiction "certainly is a state, not a federal question. Surely, [the State] has the right to say of what class of suits its own courts may take cognizance." 209 U.S. at 233 (Harlan, J., concurring). Indeed, "*Crain* may well have been overruled by Georgia R.R. v. Musgrove, 335 U.S. 900 (1949), an apparently identical case in which the Court dismissed the appeal as based on an adequate state ground." D. Currie, *Federal Courts* 208 (2d ed. 1975). See P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's Federal Courts & the Federal System* 587-588 n.2 (1988).

congressionally created causes of action." See also *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). But the States' willingness to authorize creation by Congress of federal court remedies hardly means that, in ratifying the Constitution, the States should be understood to have taken the far more radical step of waiving the protection of sovereign immunity in their *own* courts. Indeed, while the amenability of States to suit in federal court under Article III was debated extensively at the time of the Constitution's ratification (see *Welch v. Texas Dept. of Highways*, 483 U.S. 468, 480-484 (1987) (plurality opinion); *id.* at 504-507, 511-513 (Brennan, J., dissenting); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 263-280 (1985) (Brennan, J., dissenting), we are aware of no suggestion during these debates that *state courts* might be obligated to entertain claims against States. That is hardly surprising: it was and is a fundamental tenet of sovereign immunity that, wherever else it may be hauled into court, "no sovereign may be sued in its own courts without its consent." *Hall*, 440 U.S. at 416.

b. Having said all of this, it is clear to us that the Court should not attempt to resolve the difficult questions about the scope of national authority in this area unless Congress has made absolutely clear its intention to require the exercise of state court jurisdiction. Even when sovereign immunity is not at issue, a requirement that unwilling state courts entertain nonanalogous federal claims is a "substantial * * * intrusion upon the power of the states to determine the purposes to be served by agencies of state government"; "[i]n the absence of a declaration by Congress that state courts must enforce rights that Congress has created, there appears to be no substantial reason why the Supreme Court should impose such an obligation." Sandalow, *supra*, 1965 Sup. Ct. Rev. at 206-207. Such an intrusion, after all, substantially interferes with an essential element of state sovereignty: "Mr. Chief Justice Jay described sovereignty as 'the right to govern'; that kind of right would necessarily encompass the right to determine what suits may be

brought in the sovereign's own courts." *Hall*, 440 U.S. at 415, quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793). And when the federal law is said to deny States the authority to regulate their own courts in a manner that enlarges the authority of those courts to entertain claims against the State and its subdivisions, there plainly is a compelling case for application of the "ordinary rule of statutory construction that if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will*, 109 S.Ct. at 2308, quoting *Atascadero*, 473 U.S. at 242.[18]

The requisite clarity plainly is missing here. The language of Section 1983 is entirely silent on the subject of suits in state court. In fact, there is a particular irony in petitioner's insistence (Br. 27-28) that the policies advanced by the statute require the assertion by state courts of jurisdiction over Section 1983 claims: as the Court repeatedly has indicated, the statute was enacted precisely because Congress believed the state courts to be *inappropriate* fora for the effectuation of federal rights.

Indeed, when initially enacted, Section 1 of the Civil Rights Act of 1871, the predecessor to Section 1983, "provided that the federal courts would have exclusive jurisdiction of actions arising under it." *Felder*, 108

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[18] Petitioner's argument (Br. 26-27) that Congress need not express itself clearly in this setting simply disregards the intrusiveness of a federal statute that would require the States to reorder their court systems; none of the decisions cited by petitioner involved circumstances in which state courts failed to entertain analogous state law claims, and none involved sovereign immunity. In any event, it is clear that Congress is not presumed to have overridden the States' jurisdictional limits on their courts. To the contrary, the decision in *Claflin*, the fountainhead of the Court's doctrine in this area, made clear that "the State courts have concurrent jurisdiction [over actions grounded on federal law] whenever, *by their own constitution, they are competent to take it.*" 93 U.S. at 136 (emphasis added). The Court reaffirmed this understanding only last month. *Tafflin*, slip op. 3, quoting *Claflin*.

S.Ct. at 2317 (O'Connor, J., dissenting). See Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 Brooklyn L. Rev. 1057, 1072 n.72 (1989); Note, *The Enforceability and Proper Implementation of § 1983 and the Attorney's Fees Awards Act in State Courts*, 20 Ariz. L. Rev. 743, 749-750 (1978).[19] Although the jurisdictional provision of Section 1983's predecessor was modified (and divided in two) in 1874 with the codification of the Revised Statutes,[20] it apparently was not until a subsequent revision in 1911, when the jurisdictional counterparts of Section 1983's predecessor were omitted from the list of statutes creating exclusive federal court jurisdiction, that state courts first were authorized to entertain Section 1983 actions. Judiciary Act of 1911, ch. 231, § 24, 36 Stat. 1087, 1160-1161. See Note, *supra*, 20 Ariz. L. Rev. at 749-750. While it was finally settled in *Martinez*—over a century after Section 1983's predecessor was enacted—that state courts may hear Section 1983 suits, nothing in this history suggests that Congress had any intention of requiring the exercise of state court jurisdiction; instead, state courts were authorized to hear such claims almost offhandedly as part of a routine revision of the Judicial Code.

None of this is very surprising, for it would have been peculiar indeed had the 42d Congress required the adjudication of Section 1983 claims by state courts. It is, in fact, almost a truism that "'[t]he very purpose of

[19] Section 1 of the Civil Rights Act of 1871 created the familiar Section 1983 cause of action and then provided for "such proceeding to be prosecuted in the several district or circuit courts of the United States." Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. By contrast, the roughly contemporaneous statute that created general federal question jurisdiction explicitly provided for concurrent jurisdiction in the state courts. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 ("the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits [meeting a jurisdictional amount requirement] and arising under" federal law).

[20] Rev. Stat. §§ 563, 629 (1874). See generally *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608-610 (1979).

§ 1983 was to interpose the *federal courts* between the States and the people, as guardians of the people's federal rights.'" *Patsy v. Florida Board of Regents*, 457 U.S. 496, 503 (1982) (emphasis added), quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). "Although Congress did not establish federal courts as the exclusive forum to remedy these [civil rights] deprivations * * * it is plain that 'Congress assigned to the federal courts a paramount role' in this endeavor." *Will*, 109 S.Ct. at 2309, quoting *Patsy*, 457 U.S. at 503.[21] See *Felder*, 108 S.Ct. at 2311; *District of Columbia v. Carter*, 409 U.S. 418, 427-428 (1973); *Mitchum*, 407 U.S. at 240-242; Herman, *supra*, 54 Brooklyn L. Rev. at 1070-1072. The very point of Section 1983 was to create a federal court remedy for civil rights violations; enactment of the statute was inspired by "the mistrust that the 1871 Congress held for the factfinding processes of state institutions." *Patsy*, 457 U.S. at 506. The legislative history accordingly is replete with criticism of the state courts.[22]

[21] The Court noted in *Patsy* that some Members of Congress recognized that the States retained authority to rectify deprivations of federal constitutional rights. 457 U.S. at 506-507. These Members plainly had it in mind, however, that plaintiffs would proceed in state courts under state causes of action. See Cong. Globe, 42d Cong., 1st Sess. 694 (remarks of Sen. Edmunds) ("a citizen might properly be punished for violating a State law and a United States law in doing the same act. * * * [T]herefore, * * * it is no objection to the constitutional exercise of power by Congress that the States themselves in the case of these disorders in the South may, if they will, punish the same things according to their own laws"); *id.* at 514 (remarks of Rep. Poland) (referring to "concurrent penal laws"); *ibid.* (colloquy between Reps. Poland and Farnsworth) (referring to state and federal laws addressing the same subject). See also *id.* App. 85 (remarks of Rep. Bingham) ("Admitting that the States have concurrent power to enforce the Constitution of the United States within their respective limits, must we wait for their action?"); *id.* App. 216 (remarks of Sen. Thurman) ("by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States").

[22] See, *e.g.*, Cong. Globe, 42d Cong., 1st Sess. 374-376 (remarks of Rep. Lowe); App. 78 (Rep. Perry); 460 (Rep Coburn); App. 85

Indeed, had such an unlikely proposal been made, the 42d Congress would have thought itself without the constitutional authority to require state courts to entertain Section 1983 actions. As the Court has explained, the prevailing constitutional theory at the time—plainly held by a controlling bloc in Congress—was the notion of dual sovereignty that had been enunciated in *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871), *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), and *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). See *Quern v. Jordan*, 440 U.S. 332, 342 n.14 (1979); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 673-679 (1978). Under this theory, "state courts entertained federal actions solely as a discretionary 'matter of comity, which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the Constitution.'" *FERC*, 456 U.S. at 763 n.28, quoting *Dennison*, 65 U.S. (24 How.) at 109. See Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 583 (1925).

Members of Congress thus made clear their view that "'it is not within the power of the Congress of the United States to lay duties upon a State officer'" (*Monell*, 436 U.S. at 673-675, quoting Cong. Globe, 42d Cong., 1st Sess. 795 (1871) (remarks of Rep. Blair)),

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(Rep. Bingham); 321 (Rep. Stoughton); 333-334 (Rep. Hoar); 389 (Rep. Elliott); 394 (Rep. Rainey); 429 (Rep. Beatty); App. 68-69 (Rep. Shellabarger); 345, 346 (Sen. Sherman); 505 (Sen. Pratt); 577 (Sen. Carpenter); 651 (Sen. Sumner); 653 (Sen. Osborn); App. 255 (Sen. Wilson); 571 (Sen. Ames); App. 185 (Rep. Platt); 201 (Sen. Nye); 482 (Rep. Wilson); 487 (Rep. Lansing); App. 195 (Rep. Buckley); 251 (Sen. Morton); App. 277 (Rep. Porter); App. 262 (Rep. Dunnell); App. 311 (Rep. Maynard) (1871). Petitioner's observation that "it defies commonsense to argue * * * that the 42nd Congress intended to defer to the authority of the states to shield state officials from § 1983 liability" (Br. 14) accordingly misses the mark, since "most members of Congress apparently did not 'intend' the state courts to entertain section 1983 actions at all, at least not in the usual sense of the word." Herman, *supra*, 54 Brooklyn L. Rev. at 1071.

and pointed to state supreme court decisions that had invalidated federal burdens on the processes of state courts on the ground that they "threatened the independence of a vital state function." *Monell*, 436 U.S. at 679. While the *Day-Dennison-Prigg* view of federal authority, is, of course, no longer the law, see, *e.g.*, *Puerto Rico v. Branstad*, 483 U.S. 219, 224-229 (1987) (overruling *Dennison*), that understanding was controlling when Section 1983 was written; it therefore is hardly likely that the statute was intended to impose uniquely burdensome obligations on state courts. And in the absence of such a congressional intent, Section 1983 should not be read as an attempt to override neutral state jurisdictional rules.

B. School Boards In Florida May Not Be Amenable To Suit As "Persons" Under Section 1983.

The discussion above, in our view, makes clear that the district court of appeal was under no constitutional obligation to exercise jurisdiction over petitioner's claim. But even if we are wrong in this, so that the court below must entertain petitioner's suit, there is reason to doubt that the respondent school board is a proper defendant in a Section 1983 action.

We recognize, of course, that school boards often have been made defendants in such actions. See, *e.g.*, *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977); *Monell*, 436 U.S. at 663 n.5. But the Court's holding in *Will* that States are not "persons" within the meaning of Section 1983 extends to all "governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes." 109 S.Ct. at 2311. See *Monell*, 436 U.S. at 690 n.54. Whether a particular school board has the characteristics that entitle it to share in the State's immunity therefore "depends, at least in part, upon the nature of the entity created by state law." *Mt. Healthy*, 429 U.S. at 280. See *Moor v. County of Alameda*, 411 U.S. 693, 719 (1973). See generally *Lake Country Estates, Inc. v. Tahoe Regional*

Planning Agency, 440 U.S. 391, 401-402 (1979). And federal courts in other jurisdictions, after conducting a detailed review of state law, have concluded that certain school boards "should be considered arms of the state." *Garcia v. Board of Education*, 777 F.2d 1403, 1407 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986). *See Maestas v. Board of Education*, 749 F.2d 591, 592 (10th Cir. 1984); *Martinez v. Board of Education*, 748 F.2d 1393, 1394-1396 (10th Cir. 1984).

Here, there is a substantial argument that Florida school boards, like the State whose agents they are, may not be amenable to suit under Section 1983. In contrast to the state law considered relevant in *Mt. Healthy*, see 429 U.S. at 280 (citing Ohio Rev. Code Ann. § 2743.01 (Page Supp. 1975)), Florida law treats state agencies and subdivisions—including school boards—identically for sovereign immunity purposes. Fla. Stat. § 768.28(2). Indeed, Florida law has long provided that

> [c]ounty boards of public instruction are agencies of the State and as such are clothed with the same degree of immunity from suit as is the State. They are the creatures of the Constitution, constituted as quasi corporations for the purpose of exercising under legislative authority such part of the governmental powers of the State as the law confides in them.

Buck v. McLean, 115 So.2d 764, 765 (Fla. 1st DCA 1959). See *Richter v. Dade County Board of Public Instruction*, 91 So.2d 794 (Fla. 1957); *Bragg v. Duval County Board of Public Instruction*, 36 So.2d 222 (Fla. 1948).[23] As a

[23] In this, county school boards—and counties themselves—stood in sharp contrast to municipalities prior to the enactment of Florida's tort claims statute. As in most jurisdictions, municipalities in Florida had long been treated as identical to private entities for many purposes, and therefore as amenable to suit. See *Cauley v. City of Jacksonville*, 403 So.2d 379, 381-384 (Fla. 1981); *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1015-1016 (Fla. 1979); *City of Tallahassee v. Fortune*, 3 Fla. 19 (1850). See generally *Will*, 109 S.Ct. at 2310 n.7; *Owen v. City of Independence*, 445 U.S. 622, 638-639 (1980). But under Florida law, "[t]he one feature which sufficiently distinguishes [counties from municipalities] is that counties are under the [State] Constitution political subdivisions of the state, municipalities are not; the county, under our Constitution, being a mere governmental agency through which many of the functions and powers of the state are exercised." *Keggin v. County of Hillsborough*, 71 So. 372, 373 (Fla. 1916). As a result, counties were absolutely immune from suit in Florida prior to enactment of the State's tort claims statute. See, *e.g.*, *Kaulakis v. Boyd*, 138 So.2d 505, 507 (Fla. 1962); *Keggin*, 71 So. at 373; *Dade County v. Florida Ass'n of Workers for the Blind*, 173 So.2d 160, 161 (Fla. 3d DCA 1965); *Broward County v. Bouldin*, 114 So.2d 737, 741 (Fla. 2d DCA 1959).

result, county school boards (and counties themselves) may be made amenable to suit in Florida only by act of the state legislature. See, *e.g.*, *Manatee County v. Town of Longboat Key*, 365 So.2d 143, 147 (Fla. 1979).

The proposition that Florida school boards are arms of the State draws additional support from Florida's constitutional and statutory provisions dealing with public education. Florida law repeatedly makes clear that "[p]ublic education is basically a function and responsibility of the state. The responsibility for establishing such minimum standards and regulations as shall tend to assure efficient operation of all schools and adequate educational opportunities for all children is retained by the state." Fla. Stat. § 229.011. See Fla. Const. Art. IX, § 1; Fla. Stat. §§ 228.002, 228.01-.04. The "[d]istrict school system" thus is defined as "part of the state system of public education." Fla. Stat. § 228.041. See Fla. Stat. § 230.03(1). Conversely, the state board of education is "the chief policymaking and coordinating body of public education in Florida." Fla. Stat. § 229.053(1).

Needless to say, local school boards do have substantial responsibility for managing schools in their districts. See Fla. Stat. § 230.03(2). But they must exercise that responsibility "in conformity with regulations and minimum standards prescribed by the state." Fla. Stat. 230.01. The State thus sets out detailed requirements relating to personnel (Fla. Stat. §§ 231.001-.69), attendance and child welfare (Fla. Stat. §§ 232.01-.50), cur-

riculum (Fla. Stat. §§ 233.011-.63), transportation (Fla. Stat. §§ 234.01-.212), and use of educational facilities (Fla. Stat. §§ 235.001-.435). See also Fla. Stat. §§ 228.093 (record-keeping); .101 (display of flags); .121 (tuition); .195 (food service programs). And while school boards may levy taxes and issue bonds, as concededly also was true in *Mt. Healthy*, see 429 U.S. at 280, in doing so (and in spending the money) Florida boards are subject to a comprehensive series of state restrictions. See Fla. Stat. §§ 236.36-.52, §§ 237.02, .031, .041, .081. Indeed, the State directly provides over 50% of respondent school board's budget.[24]

In short, Florida school boards, acting under strict state requirements, perform a function that is avowedly the State's responsibility; much of their money comes directly from the State, and all of their money is spent in conformity with the State's rules. In our view, these considerations raise substantial doubts about whether Section 1983 provides a cause of action against respondent school board. But resolving those doubts requires analysis of a complex state law whose significance was not addressed by the court below. If this Court concludes that the state courts must exercise jurisdiction here, the factors set out above strongly suggest that Florida school boards are arms of the State. And at a minimum, it would be appropriate to remand the case so that the court below may, in the first instance, have an opportunity to determine whether respondent school board should be treated as a "person" within the meaning of *Will*.[25]

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[24] State funds account for 52.1% of the Pinellas County Schools' 1989-1990 budget. Annual Budget Summary, 1989-90, Pinellas County Schools, Clearwater, Florida, 3.

[25] As petitioner recognizes (Br. 11 n.9), he also would be obligated to demonstrate on remand that the challenged practices were taken pursuant to an official school board policy. See *Monell*, 436 U.S. at 691-695.

CONCLUSION

The judgment of the district court of appeal should be affirmed.

Respectfully submitted,

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